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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. .....

REVERE COPPER AND BRASS INCORPORATED,

Petitioner,

v.

OVERSEAS PRIVATE INVESTMENT CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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April 8, 1980

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OVERSEAS PRIVATE INVESTMENT CORPORATION,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Revere Copper and Brass Incorporated ("Revere") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in *Revere Copper and Brass Incorporated* v. *Overseas Private Investment Corporation*, No. 79-1159 (D.C. Cir.).

Opinions Below

The opinion of the court of appeals (set forth beginning at page 1a of the Appendix to this Petition) is not yet reported. The opinion of the United States District Court for the District of Columbia (set forth beginning at page 8a of the Appendix) is not reported.

Jurisdiction

The judgment of the court of appeals was entered on February 26, 1980. This petition is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

Questions Presented

1. Does the Federal Arbitration Act require a United States district court to enforce an award which, in contravention of public policy, permits an insurer to sell an ambiguous insurance policy and then use the ambiguity as a defense against the insured?

2. Does the federal policy of the Labor-Management Relations Act, 1947, which favors arbitration of disputes between labor and management, extend to review under the Federal Arbitration Act of an award in a dispute between insured and insurer so that it may be used to override the rule of public policy which requires that an ambiguity in an insurance policy be construed in favor of the insured and against the insurer?

Statutory Provisions

Sections 1, 2, 9, 10, 11 and 13 of the Federal Arbitration Act (the "Arbitration Act"), 9 U.S.C. §§ 1, 2, 9, 10, 11 and 13 (1976), §§ 203(d) and 301 of the Labor Management Relations Act, 1947 (the "Labor Act"), 29 U.S.C. §§ 173(d), 185 (1976), and § 482 of the Internal Revenue Code, 26 U.S.C. § 482 (1976) (to which reference was made in the insurance policy) are set forth beginning at page 12a of the Appendix.

Statement of the Case

Revere purchased insurance from respondent Overseas Private Investment Corporation ("OPIC") covering the major portion of Revere's $100,000,000 investment in Jamaica against the risk of expropriation. In this proceeding under the Arbitration Act, the district court sustained an award which determined that Revere had suffered a total loss by reason of expropriation by the Government of Jamaica on June 30, 1974, when Revere's insured equity investment was $64,131,100, but which awarded Revere only $1,131,144 as compensation. The court of appeals affirmed.

The award resolved an ambiguity in the insurance policy in favor of the insurer and thereby cost the insured $63,000,000. On its face, the award was contrary to public policy. In insurance, an ambiguous policy provision must be construed in favor of the insured—a rule not of convenience or a technicality of legalists, but rather a rule based upon the sound public policy that insurers should not be permitted to sell on clear clauses of liability and defend on obscure negations of liability. The power of the courts is at all times exercised subject to the restrictions and limitations of the public policy of the United States.

The district court and the court of appeals believed that their review under the Arbitration Act of this arbitration award made in an insurance dispute was governed by the federal policy expressed in the Labor Act favoring arbitration of labor disputes—a policy which recognizes that in the labor-management relationship arbitration is the substitute for industrial strife and that the collective bargaining agreement is a generalized code to be applied by the arbitrator to cover a myriad of cases which the draftsmen of the agreement cannot wholly anticipate. In con-

trast, the Arbitration Act, which exempts labor disputes from its coverage, 9 U.S.C. § 1 (1976), simply makes arbitration agreements enforceable like other contracts, but not more so; it places them on the same footing as other contracts. They and the awards made pursuant to them are subject to considerations of public policy. The Arbitration Act does not require a district court to enforce as its judgment a commercial arbitration award which is contrary to public policy. The confusion by the courts below of two very different statutes and policies led them to sustain an award contrary to public policy.

The substance of the decision below is that the Arbitration Act does not permit the disturbance of any non-corrupt arbitration award. Unless corrected, it impairs the credibility of the political risk insurance program of the Government insurer under which approximately $9,000,000,000 of insurance is in force and which requires arbitration of disputes between insured and insurer. It weakens public confidence in the process expressly provided by the Arbitration Act for vacating awards made in excess of the arbitrators' powers and negates the acceptability of arbitration as a mechanism for the resolution of commercial disputes. It does a serious disservice to arbitration as an alternative to litigation in the overburdened courts.

The insurance—OPIC, an agency of the United States Government, 22 U.S.C. § 2191 (1976), was created "[t]o mobilize and facilitate the participation of United States private capital and skills in the economic and social development of less developed friendly countries and areas . . . ." (*ibid.*) To induce such investment by American companies, OPIC provides insurance against the risk of expropriation and other political risks. It charges substantial premiums and is self-sustaining. According to its 1978 Annual Report, OPIC's net income for the year was

$60,000,000 and its insurance reserve was $283,000,000. OPIC is reinsured at Lloyd's and that reinsurance apparently protects OPIC for the first $18,000,000 of Revere's claim.

In the latter 1960's and early 1970's, Revere constructed the sequence of integrated facilities necessary to produce primary aluminum. Revere built a 112,000-ton per year aluminum reduction plant in Alabama. Bauxite, largely lacking in this country, was available in Jamaica, W. I., but the Government of Jamaica, the owner of all bauxite on the island, conditioned the right to mine bauxite upon Revere's construction in Jamaica of a plant to refine the bauxite into alumina, the intermediate feed stock for aluminum. At a cost of some $100,000,000 invested or loaned by Revere, Revere Jamaica Alumina, Ltd. ("RJA"), Revere's wholly-owned subsidiary, constructed a bauxite mining and alumina refining complex in Jamaica to supply alumina to the Alabama aluminum reduction plant. Commercial production of alumina by the Jamaican plant began in December 1972.

Revere took such measures as were available to it to safeguard its investment in Jamaica against political risk. RJA entered into a 25-year investment agreement with the Government of Jamaica which contained basic assurances for the protection of RJA's property and operations. Relying upon the inducement for private investment in countries such as Jamaica provided by OPIC's political risk insurance, Revere purchased from OPIC, for an annual premium of approximately $600,000, insurance covering Revere's equity investment in RJA against the risk of expropriation by the Government of Jamaica, including the risk that the Government might repudiate its investment agreement with RJA.

OPIC was the only American source of political risk insurance. Its standard form insurance policy was a take-it-or-leave-it proposition for prospective insureds. The policy was issued in September 1970 by the Agency for International Development on behalf of OPIC, 35 Fed.Reg. 43 (Jan. 3, 1970). The table of contents of the 37 printed pages of the General Terms and Conditions is set forth beginning at page 18a of the Appendix. The provisions of the OPIC insurance policy relevant to the issues of compensation are set out in an appendix to the arbitration award (83a, 132a-134a).

In the first half of 1974, the Government of Jamaica, led by Prime Minister Michael Manley who had come to power in 1972, took various actions which under OPIC's policy constituted the insured peril of expropriatory action. Revere made claim upon OPIC. When OPIC did not honor Revere's claim, Revere submitted the resulting dispute to arbitration in Washington, D. C., as Revere was required to do by OPIC's form policy.

The award—Revere filed its demand for arbitration with the American Arbitration Association on December 20, 1976. The award of the three arbitrators was filed on August 25, 1978. The award, which is in five parts, is set forth beginning at page 26a of the Appendix.

Two of the three arbitrators (G.W. Haight, Esq. and Carroll R. Wetzel, Esq.) held that as of June 30, 1974 the Government of Jamaica had repudiated its investment agreement with RJA, which had 20 years to run and upon which Revere had relied in investing in or loaning $100,000,000 to RJA (42a), and that the repudiation was expropriatory action insured against by OPIC (83a, 108a). The third arbitrator (Hon. Francis Bergan) dissented from this holding (109a); he said nothing concerning the

different question of the amount of compensation due Revere under OPIC's policy.

The majority further held that the expropriatory action was of the kind that constituted a total loss entitling Revere under the policy to compensation in the full amount of its insured equity investment at the date of expropriation (86a) against assignment by Revere to OPIC of the stock certificates evidencing Revere's insured investment in RJA. The majority found that at June 30, 1974, the date of expropriation, the amount of Revere's insured equity investment in RJA, determined in accordance with generally accepted accounting principles, which the policy established as the governing criteria for the computation of loss and compensation (134a), was $64,131,100 (102a).

At the conclusion of the hearings, OPIC had submitted a letter to the arbitrators setting forth the adjustments it argued should be made in the amount of Revere's insured investment. Two alternative examples were given of OPIC's calculations of amounts of compensation due Revere at the date of expropriation. OPIC's examples were $37,289,000 or $38,401,000.

The arbitral majority awarded Revere only $1,131,144 as compensation for the total loss of its insured investment (108a). They made three adjustments totalling $62,999,856 in the $64,131,000 amount of Revere's investment (87a-102a). They relied upon a sentence in OPIC's insurance policy which is ambiguous both intrinsically and because it contradicts the compensation provisions of the contract. They did so despite their admission that there was "force" to Revere's contention that the sentence was "essentially meaningless" (85a, 86a).

The relevant provisions of OPIC's policy were made part of the award (83a, 132a-134a). The compensation provi-

sions of OPIC's policy are §§ 15.01, 17.01, 18.01 and 18.03* (133a-134a) and "Net Investment" which is particularly defined in § 1.28 (132a) as "the amount of the Investment contributed for equity Securities [here $77,182,600 invested in cash by Revere for common stock of RJA] . . . adjusted for . . . such equity Securities' ratable share of net retained earnings and losses (including but not limited to realized capital gains or losses . . .) of the Foreign Enterprise [RJA] . . ."—the amount which appeared on RJA's balance sheet as "stockholder's equity" and which at June 30, 1974 was $64,131,000. Alternative compensation measurements such as market value or replacement value were excluded by OPIC's balance sheet definition of Net Investment. Section 18.01 provides that compensation for a total loss "shall be the Net Investment determined as of the Date of Expropriation . . ." (133a).

The arbitral majority relied, however, on a sentence in § 2.09 of the contract reading: "The amount of the Net Investment . . . shall be deemed to include the standards of accounting required by Section 482 of the Internal Revenue Code . . . and by any regulations issued . . . to amend [*sic*], interpret or implement said section . . ." (133a). There is no cross reference to this sentence in the definition of Net Investment quoted above or in the other compensation pro-

* Section 18.03 provides that loss "shall be determined in accordance with accounting and valuation principles generally accepted in the United States of America and consistently applied" (134a). The reference to "valuation" is only pertinent to the loss of an Investment made in kind. Revere's original Investment of $77,182,600 was made in cash.

The first and second sentences of § 2.09 (132a) also require that the Investor's books of account "covering the amount of the Net Investment" be maintained "in accordance with accounting principles generally accepted in the United States" and that the financial statements of the Foreign Enterprise be "prepared in accordance with accounting principles generally accepted in the United States".

visions of OPIC's policy. Section 482 (17a, 134a) gives the Secretary of the Treasury discretionary authority, which has been delegated to the Internal Revenue Service, to make adjustments in gross income, deductions, credits or allowances as between commonly controlled taxpayers so as to establish "true taxable income", 26 C.F.R. § 1.482-1(b)(1).

In addition to arguing that the sentence was essentially meaningless—§ 482 of the Code is discretionary, does not set forth standards of accounting and, of course, may not be amended by administrative regulation—Revere proffered two constructions of the sentence which were related to the tax adjustments which § 482 authorizes the Internal Revenue Service to make and which permitted a reconciliation, rather than created a conflict, with the compensation provisions of OPIC's policy: Net Investment is to be adjusted either (i) for the balance sheet effect of tax adjustments actually made by the Service under § 482 in the consolidated tax returns of Revere and its subsidiaries, or (ii) for the balance sheet effect of § 482 tax adjustments which the Service might reasonably be expected to make. The effect here of the former construction upon Net Investment would have been zero, while the effect of the latter might have been a $1,785,000 reduction in Revere's insured Net Investment.

The arbitral majority, however, derived from the sentence in § 2.09 of OPIC's insurance policy and the 27-page regulation under § 482, 26 C.F.R. § 1.482 (1978), an "arm's length standard" (86a-87a)* and on the basis of that standard made balance sheet adjustments in Net Investment which could not result from the tax adjustments permitted

* If OPIC intended to provide for an "arm's length standard" and the consequences to the insured which according to the arbitral majority resulted from that standard, it could, beginning with those three words, have said so. *Pan American World Airways, Inc.* v. *Aetna Casualty & Surety Co.*, 505 F.2d 989, 999-1004 (2d Cir. 1974).

by § 482. Disregarding the constructions of the ambiguity of OPIC's policy which were favorable to Revere, the insured, the majority employed the construction most favorable to OPIC, the insurer.

By reason of expropriatory action occurring 19 months after RJA's plant began commercial operation, Revere's insured investment was totally lost. Yet Revere was awarded compensation under OPIC's insurance policy of less than 2% of Revere's insured investment measured by generally accepted accounting principles, less than 3% of the amounts of OPIC's compensation examples and less than 50% of the $2.375 million in insurance premiums Revere had paid OPIC during the three years and nine months OPIC's insurance had been in force.

The public policy which determines the outcome of any dispute between insured and insurer when the insurance policy is ambiguous governs when an arbitration award is challenged in the district court as it does when an action on the insurance policy is brought in the district court. This is particularly so when the Government insurer was the sole practicable source of the insurance, when the insurer provided the insurance as part of a Governmental effort to induce private American investment in less developed countries as a complement to the Government's own political policy and when the award is the product of an arbitration compelled by the Government insurer's form insurance policy.

The district court decision—Revere moved in the district court for an order, pursuant to § 11 of the Arbitration Act (14a), correcting the amount of compensation by eliminating the three adjustments which the arbitral majority had made in the amount of Revere's insured investment or for an order, pursuant to § 10 of the Arbitration Act (13a-14a), vacating the award as to the amount of compensation. The

district court had jurisdiction pursuant to 28 U.S.C. §§ 1331(a), 1332, 1337 and 1349, 9 U.S.C. §§ 1, 10 and 11 and 22 U.S.C. § 2199(d). The district court (Richey, D. J.) dismissed the proceeding by denying Revere's motion in a memorandum order (8a-11a).

Revere's argument that, in addition to their disregard of public policy, the arbitral majority had exceeded their powers by rewriting OPIC's policy—as an example, by reducing Revere's insured investment by $46.3 million for an estimated "unrealized" loss although the policy definition of Net Investment (quoted at p. 8, *supra*) permits adjustments only for "realized" gains or losses—was said by the district court, without mention of the subject of Revere's argument, to "amount to no more than the contention that the arbitrator misconstrued the contract" (10a).

Revere argued that an award which is contrary to public policy may not be enforced by a United States district court under the Arbitration Act. OPIC argued for a narrow formulation, developed in review of awards made under collective bargaining agreements and reflecting the policy stated in § 203(d) of the Labor Act and the enforcement authority given the district courts in § 301 of the Labor Act, that an award may only be disturbed if it "compels the violation of law or conduct contrary to accepted public policy". The district court ascribed (10a) to Revere that which was OPIC's argument, accepted its correctness (11a) and then concluded that "the award of $1 million" would not have the "result" which supposedly Revere had argued was forbidden (*ibid.*).

The district court suggested that there had been "no showing" that the OPIC insurance policy is ambiguous "other than a passing reference by the majority of the

arbitrators to the 'force' of an alternative interpretation" (11a). But the district court's own paraphrase—an "alternative interpretation"—conceded the recognition by the arbitral majority of the ambiguity of OPIC's policy. More particularly, what the district court characterized as an "alternative interpretation", to which the arbitral majority had ascribed "force", was in fact Revere's argument that the sentence in the OPIC contract upon which the arbitral majority relied was "essentially meaningless" (85a-86a) and thus at the least ambiguous.

The court of appeals decision—The *per curiam* decision of the court of appeals (Lumbard, S.C.J., Tamm and Mikva, C.JJ.) affirmed the district court judgment (7a).

1. The court quoted (3a) the description in *Continental Casualty Co.* v. *Beelar,* 405 F.2d 377, 378 (1968), of the rule of *contra proferentem* as a "rule of construction". It did not refer to its own statement in *Hayes* v. *Home Life Ins. Co.,* 168 F.2d 152 (D.C. Cir. 1948):

> "The rule that a real ambiguity in an insurance policy is to be construed against the company is not a rule of convenience or a mere technicality of legalists. It is based upon sound public policy. . . . If the companies were permitted to write clear clauses of liability at one point and obscure negations of liability at another, and to maintain successfully the prevalence of the latter over the former, the temptation to sell on one clause and defend on the other would be dangerous." (168 F.2d at 154-55).

Nor did it refer to this Court's statement in *Stroehmann* v. *National Life Ins. Co.,* 300 U.S. 435 (1937):

> "The rule is settled that in case of ambiguity that construction of the policy will be adopted which is most favorable to the insured. The language employed is that of the company and it is consistent with both reason and justice that any fair dispute as to the meaning of its own words should be resolved against it." (300 U.S. at 439).

2. The court stated (3a), as had the district court (11a), that there is a "strong federal policy in favor of voluntary commercial arbitration" (3a, 5a). For the existence of this policy, it quoted from the preamble to the Arbitration Act, which states only that its purpose is "[t]o make valid and enforceable written provisions or agreements for arbitration", and a statement from *Hanes Corp.* v. *Millard,* 531 F.2d 585, 597 (D.C. Cir. 1976), which referred to a "strong federal policy" (3a).

The Congressional purpose was, however, made clear by this Court in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.,* 388 U.S. 395 (1967):

> "As the 'saving clause' in § 2 [of the Arbitration Act] indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, *but not more so.*" (388 U.S. at 40[illegible] n.12, emphasis supplied)

Section 2 provides that an arbitration provision is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Public policy is, of course, such a ground.*

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* "The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes and applicable legal precedents. Where the enforcement of private agreements would be violative of that public policy, it is the obligation of courts to refrain from such exertions of judicial

The court did not refer to this Court's statement in *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974):

> "The . . . Arbitration Act . . ., reversing centuries of judicial hostility to arbitration agreements, was designed to allow parties to avoid 'the costliness and delays of litigation,' and to place arbitration agreements *'upon the same footing as other contracts . . .'*" (417 U.S. at 510-11, emphasis supplied, citations and footnote omitted)

This statement was quoted in *Hanes Corp.* (531 F.2d at 597), upon which the court of appeals relied. Both *Scherk* and *Hanes* involved international contracts providing for arbitration abroad. In both cases, the parties were ordered to proceed with the agreed-upon arbitration from which a foreign award would necessarily result. United States district courts are explicitly authorized to deny enforcement to a foreign award which is contrary to domestic public policy. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* [1970] 3 U.S.T. 2517, T.I.A.S. No. 6997; Chapter 2 of the Arbitration Act, 9 U.S.C. § 201 *et seq.; Scherk,* 417 U.S. at 519 n.4. An explicit limitation upon a treaty undertaking is understandable, but no Congressman would have thought it necessary to make explicit in the original Arbitration Act the public policy limitation upon the authority of the district courts which is so plain in domestic law. In any case, under § 10 an award may be set aside "[w]here the arbitrators exceeded their powers" and arbitrators do not have the power, any more than judges, to make decisions contrary to public policy.

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power." *Hurd* v. *Dodge,* 334 U.S. 24, 34-35 (1948) (footnotes omitted).

An award which is contrary to public policy may not be judicially enforced since the judgment of the district court entered under § 13 of the Arbitration Act would itself be contrary to public policy.

3. The court of appeals recognized here (4a) "the rule that enforcement of arbitration awards is subject to public policy considerations." The court, however, repeated (4a) the formulation employed by the district court that only if an award "compels the violations of law or conduct contrary to accepted public policy" may it be set aside.* The court disagreed (4a n.1) with Revere's contention that arbitration of commercial disputes under the Arbitration Act are not subject to the federal policy favoring the resolution of labor disputes by consensual arbitration.

The court did not accept that under the Arbitration Act an arbitration agreement is as enforceable as other contracts, "but not more so". *Prima Paint,* 388 U.S. at 404 n.12. The court did not take into account this Court's statements in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960), that in the labor context "arbitration is the substitute for industrial strife", that "arbitration of labor disputes has quite different functions from arbitration under ordinary commercial agreements" and that the collective bargaining agreement is "more than a contract", rather it is "a generalized code to cover a myriad of cases which the draftsmen cannot

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* This formulation by the district court in *Union Employers Division of Printing Industry, Inc.* v. *Columbia Typographical Union No. 101,* 353 F.Supp. 1348, 1349 (D.D.C. 1973), *aff'd w/o opinion,* 492 F.2d 669 (D.C.Cir. 1974), was the quotation of a dictum in *Washington-Baltimore Newspaper Guild, Local 35* v. *Washington Post Co.,* 442 F.2d 1234, 1239 (D.C.Cir. 1971), where an award under a collective bargaining agreement was challenged but not on any ground of public policy. This dictum was in turn derived from *Gulf States Tel. Co.* v. *Local 1692, International Brotherhood of Electrical Workers,* 416 F.2d 198, 201 (5th Cir. 1969), where the award required the reinstatement of a discharged employee and thus "conduct" on the part of the employer. The court there sustained the award, deriving its formulation from Dunau, *Three Problems in Labor Arbitration,* 55 Va.L.Rev. 427 (1969) (416 F.2d at 201 n.6).

wholly anticipate" (363 U.S. at 578). These attributes of labor arbitration are entirely at variance with commercial arbitration.

This Court stated in *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960), which was not referred to by the court of appeals, that there is a "federal policy in favor of settling labor disputes by arbitration . . . [which] would be undermined if courts had the final say on the merits of the awards."* This Court pointed out in *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 566 (1960), also not referred to by the court of appeals, that this federal policy is expressed in § 203(d) of the Labor Act.** Section 203(d) has no counterpart in the Arbitration Act. In commercial arbitration, the agreement to arbitrate and to accept the award as binding is no more sacrosanct than any other contract term.

4. The court cited (5a) the opinion of an intermediate appellate court of California in an arbitration under an uninsured motorist clause concerning the difference that court saw "between the enforcement of a void contract and

* The court of appeals quoted the phrase in *Enterprise Wheel* concerning the "undermining" of the federal policy of settling labor disputes by arbitration, but did so without quotation marks or citation, other than to a student note, and with the substitution of "voluntary commercial arbitration" for "settling labor disputes" (5a-6a).

** Section 203(d) provides:

"Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement . . . ."

Section 301 gives the district courts jurisdiction of suits for violation of contracts between employers and labor organizations, and thus provides a mechanism for the enforcement of arbitration clauses in collective bargaining agreements and resulting awards which are outside the operation of the Arbitration Act.

the mere misunderstanding or misapplication of rules of law. . . ." *Interinsurance Exch. Auto Club* v. *Vailes*, 219 Cal.App.2d 830, 33 Cal.Rptr. 533, 538 (1963). In a later decision the same court held that "where the error appears on the face of the award and causes substantial injustice, the award may be vacated", *Campbell* v. *Farmers Insurance Exch.*, 260 Cal.App.2d 105, 67 Cal.Rptr. 175, 179 (1968), but the court of appeals said here that the later decision was "inapposite" since, so the court said, the award here is not erroneous on its face (5a n.2).* The court did not mention the statement of the highest court of California that in insurance disputes the rule of *contra proferentem* "does not serve as a mere tie-breaker; it rests upon fundamental considerations of policy." *Stevens* v. *Fidelity & Casualty Co.*, 58 Cal.2d 862, 871, 377 P.2d 284, 290 (1962).

5. The court pointed (6a) to the fact that the Foreign Assistance Act of 1969, 22 U.S.C. § 2197(i), sanctioned arbitration. But the Congressional grant to a Government agency of authority to arbitrate does not carry with it implicit Congressional approval of arbitration awards which are contrary to public policy.

6. The court also cited (6a) a dictum in *Amicizia Societa Navigazione* v. *Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805 (2d Cir. 1960), that misapplication of the principle that ambiguous language is to be construed against the author ". . . 'does not rise to the stature of a "manifest disregard" of law.'" But *Amicizia* involved a charter party,

* If the court meant that examination of evidence before the arbitrators was necessary to Revere's position, it was wrong. The award itself and the pertinent provisions of OPIC's policy made part of the award suffice. If the court meant that in its view the award was correct on its face, a one sentence footnote, the thrust of which was to criticize Revere for citing the *Campbell* decision, was a singularly oblique way of saying so.

not an insurance policy, and the challenge to the award was that the arbitrators had improperly relied upon, rather than disregarded the principle.

7. The court spoke of the policy which it asserted as one which favors "voluntary" commercial arbitration (3a, 5a) as a "mutually agreeable" alternative to litigation (7a n.3). It did not "find credence in Revere's claim that it was compelled to accept the arbitration provision in its contract with OPIC" (7a). Apparently the court's disbelief was based upon the facts that, when OPIC denied its claim, Revere commenced the arbitration as OPIC's policy required and that Revere sought an order correcting or vacating the award in part. OPIC was the only source of expropriation insurance, and the 37 printed pages of its policy formed a single block. That fact alone may not have constituted "coercion", *Scherk,* 417 U.S. at 519 n.14, but for Revere to proceed under the arbitration clause of the OPIC policy was neither "voluntary" nor "mutually acceptable". An invalid severable part of an award may, of course, be vacated and an award may be corrected; OPIC did not challenge the award as to liability.

8. Finally, the court, citing *Enterprise Wheel* (compare p. 15 n.*, *supra*), stated (7a) that a "cursory reading" of the award "indicates" that it "draws its essence" (363 U.S. at 597) from the OPIC insurance policy. Whether the court meant anything other than that the subject of the award was Revere's investment, the actions of the Government of Jamaica and OPIC's insurance against expropriatory action and what consideration the court gave to the award are unclear.

Reasons for Granting the Writ

The court of appeals commingled the Labor Act and the Arbitration Act. It did so although labor disputes are expressly excluded from the coverage of the Arbitration Act by § 1 and although there is no Congressional purpose favoring arbitration of commercial disputes in contrast to that expressly stated in § 203(d) of the Labor Act.

The court of appeals asserted that the principles which govern review of awards in labor arbitration are, and should be, those governing review of awards in commercial disputes. Its assertion conflicts with the teaching of the *Steelworkers* trilogy and *Prima Paint* and *Scherk* that commercial arbitration and labor arbitration and the statutes governing them are very different. The court's confusion of the two statutes and the different policies which they express—the neutral provision of an alternative to litigation of commercial disputes, on the one hand, and the encouragement of consensual arbitration for the resolution of labor disputes, on the other—resulted in the sustaining of an award which on its face violates fundamental public policy.

The questions presented address the proper interpretation of the Arbitration Act and of the Labor Act as well since the lower courts used a policy formulation derived from it to override the public policy applicable to insurance disputes. They are questions of public importance and of importance to the parties.

For Revere, their importance is measured by $62,999,856. For OPIC, their importance is measured by the same amount and in terms of the credibility of its political risk insurance program, under which some $9,000,000,000 of insurance is in force, and the perceived fairness of the arbitration process upon which it has insisted in its stan-

dard form insurance policy. Resolution of these questions adversely to OPIC would in a larger sense be to its benefit.

Beyond these measurements of importance is the significance of these questions to the possibility of utilizing arbitration as a means of lessening the burden upon the courts of the present flood of litigation. The adoption of arbitration as the system for the resolution of, at the least, smaller disputes requires public and legislative confidence that arbitrators will be responsive in some degree to some system of what might be called law. Arbitrators and arbitration do not enjoy the confidence enjoyed by the courts. The bills pending in Congress, S. 373, 96th Cong., 1st Sess. (1979); H.R. 2699, 96th Cong., 1st Sess. (1979), which provide for compulsory arbitration for the resolution of specified civil disputes include provisions for judicial trial *de novo* at the request of any party.

In labor arbitration, the arbiter is selected by management and by the union to serve for a period of time. He is expected to decide the "myriad of cases which the draftsmen [of the collective bargaining agreement] cannot wholly anticipate." *Warrior & Gulf*, 363 U.S. at 578. He will decide many grievances, some for one side, some for the other. His continued tenure when the collective bargaining agreement is renewed will depend upon the perception which each side has of his even-handedness and, more important, the success he has had in minimizing labor-management friction and work stoppages.

Arbitration of commercial disputes is very different. The dispute is singular, not one of a series. There is no expectation that loss of one arbitration may be counterbalanced, as in labor arbitration, by success in the next one. The arbitrators are selected *ad hoc*. The parties do not ask for infallibility, but they do expect that the dispute will be resolved with regard the terms of the agreement between them and

with some relation to the legal principles with which lay businessmen are familiar.* When the result radically disappoints these expectations, confidence in the process is destroyed.

This is not to say that arbitrators may not err. It is rather that beyond the specialized industries, *e.g.*, shipping,** and special contexts, *e.g.*, international contracts, where the particular practices or necessities of the industry or context have made it customary, arbitration of civil disputes will not be accepted if arbitrators are viewed as entirely free to make arbitrary decisions from which no relief may be had.

The courts—here the court of appeals and the district court, but they are far from being alone—have, we submit, succumbed to the "glib generalizations and unthinking abstractions" against which this Court warned in a different context in *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 465 (1969). There is a federal policy which favors labor arbitration, while the federal policy with respect to com-

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* The " 'objectively reasonable expectations' of businessmen" determine the outcome of commercial insurance disputes in the courts. *Ore & Chemical Corp.* v. *Eagle Star Ins. Co.*, 489 F.2d 455, 456 (2d Cir. 1973); *Bird* v. *St. Paul Fire & Marine Ins. Co.*, 224 N.Y. 47, 51, 120 N.E. 86, 87 (1918) (Cardozo, J.).

In commercial insurance, resolution of disputes concerning those expectations—the intent of the parties—depends upon "[a] common-sense of appraisement of every day forms of speech and modes of thought . . . ." *Bird*, 224 N.Y. at 51, 120 N.E. at 87. This Court looks to the "usual meaning" of words. *Kissinger* v. *Reporters Committee for the Freedom of the Press*, 48 U.S.L.W. 4223 (U.S. March 3, 1980) (Congressional intent).

** In a charter party "a single short (and often, to the uninitiate, obscure) expression may refer to a whole set of complicated practices perfectly familiar to those who deal regularly in such matters . . . . In such a field, it is not surprising that arbitration . . . has largely taken the place of litigation." *I/S Stavborg* v. *National Metal Converters, Inc.*, 500 F.2d 424, 427 (2d Cir. 1974) (quoting G. Gilmore & C. Black, *The Law of Admiralty* (1957)).

mercial arbitration is neutral. This was not a labor arbitration; it was a commercial arbitration, more particularly an insurance arbitration.* "[W]e have taken the law of insurance practically out of the category of contract . . . ." ** Insurance is "essentially different from ordinary commercial transactions, and . . . according to the sense of the world from the earliest times—certainly the sense of the modern world—is of the greatest public concern." *German Alliance Ins. Co.* v. *Lewis,* 233 U.S. 389, 414-15 (1914).

In this area of important national interest and concern, the application of the rule of *contra proferentem* fulfills the critical regulatory function of making insurers responsible if they produce and market ambiguous policies of insurance. If the rule can be disregarded, some other and less salutary means would have to be devised to regulate and control the production and marketing of insurance policies.***

In the relationship between insured and insurer, as contrasted with other contractual relationships, the rule of *contra proferentem* "defines the scope of coverage as much as if it were a clause in the . . . polic[y]. It is part of the understanding of the parties." *Pan American World Airways, Inc.* v. *Aetna Casualty & Surety Co.,* 505 F.2d 989, 1003 (2d Cir. 1974); *Filor, Bullard & Smyth* v. *Insurance*

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* Disputes between insured and insurer are seldom the subject of arbitration. The language of OPIC's policy requiring arbitration is, however, subject to no regulatory control.

** R. Pound, *The Spirit of the Common Law* 29 (1921).

*** In the insurance context the rule of *contra proferentum* performs the function performed in the products liability context by the legal doctrines which encourage manufacturer responsibility and provide consumer protection.

Co. of North America, 605 F.2d 598 (2d Cir. 1978).* The rule does not depend upon the insured's lack of economic strength or sophistication, but rather upon the insured's practical inability in the circumstances to negotiate the contract terms. The rule has been applied in favor of a New York Stock Exchange member firm, *Filor, Bullard & Smyth,* 605 F.2d at 602, 605, a major airline, *Pan American World Airways,* 505 F.2d at 1002-03, a national bank, *First National Bank* v. *United States Fidelity & Guaranty Co.,* 416 F.2d 52, 56 (5th Cir. 1969), and one insurance company in dispute with another insurance company, *London Assurance Corp.* v. *Thompson,* 170 N.Y. 94, 62 N.E. 1066 (1902).

For this Court to hear and determine the questions presented by this Petition would not expose the courts to unwarranted attempts to obtain review of arbitration awards. The grounds of review permitted by the Arbitration Act are narrow and will remain so. The questions presented are questions of statutory interpretation.

In doing justice for Revere, this Court would tell the lower courts plainly that commercial arbitration is different from labor arbitration and that the Arbitration Act does not require unthinking enforcement of every noncorrupt award. This Court will have strengthened confidence in the arbitration process without encouraging attacks upon particular results of arbitration.

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* *See also Ross* v. *Royal Globe Ins. Co.,* 612 F.2d 379, 381 (8th Cir. 1980) (recognizing *contra proferentem* in insurance disputes as "a benchmark principle").

CONCLUSION

The writ prayed for should issue.

Respectfully submitted,

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April 8, 1980

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1159

REVERE COPPER AND BRASS INCORPORATED,

Appellant,

v.

OVERSEAS PRIVATE INVESTMENT CORPORATION,

Appellee.

Appeal from the United States District Court
for the District of Columbia

(Misc. No. 78-0296)

Argued October 25, 1979

Decided February 26, 1980 Judgment entered this date

William E. Hegarty for appellant.

Michael B. Sheppard, with whom *E. Donald Elliott* was on the brief, for appellee.

Before J. EDWARD LUMBARD,* *U.S. Senior Circuit Judge for the Second Circuit,* and TAMM and MIKVA, *Circuit Judges.*

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* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1976).

Opinion Per Curiam.

PER CURIAM: Appellant, Revere Copper and Brass Incorporated (Revere), seeks reversal of the district court's denial of Revere's motion to correct or vacate in part an arbitration award. The origin of the arbitration award in question is an insurance contract under which the appellee, Overseas Private Investment Corporation (OPIC), an agency of the United States, insured Revere against losses incurred by expropriation of Revere's investment in its wholly-owned subsidiary's aluminum mining and refinery complex in Jamaica. Section 10.01 of the contract provides that any disputes thereon "shall be settled by arbitration . . . [and] . . . [t]he award rendered by the arbitrator shall be final and binding upon the parties . . . ."

Following a change in administration of the Jamaican government, Revere made claim upon OPIC for compensation, alleging that actions by the new government constituted an expropriation of Revere's property. When OPIC denied the claim, Revere submitted the dispute to arbitration. The arbitrators determined that there was expropriatory action but awarded Revere $1,131,144, instead of the $64,131,000 that Revere had claimed.

Revere then filed its motion in the district court, seeking to correct or vacate the portions of the arbitrators' award in which the amount of the award was determined. Judge Charles R. Richey concluded that "Revere's claims amount to no more than the contention that the arbitrators misconstrued the contract. . . . [which] 'is not open to judicial review.' *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198, 203 n.4 (1956)." *Revere Copper & Brass, Inc. v. Overseas Private Investment Corp.*, No. 78-0296, Order at 2-3 (D.D.C. Dec. 8, 1978), *reprinted in* Joint Appendix (J.A.) at 447a, 448a-49a. Judge Richey rejected Revere's claim that the award must be set aside for public policy reasons because it violates the rule of *contra proferentem*. *Id.* at 3, *reprinted in* J.A. at 449a. *Contra proferentem* is "the rule of construction that ambiguities in insurance contracts are resolved favorably to the insured." *Continental Casualty Co. v. Beelar*, 132 U.S. App. D.C. 1, 2, 405 F.2d 377, 378 (1968). The rule developed in recognition that insurance policies are usually written by the insurer, and the insurer ought not be allowed to benefit from any ambiguities in the language which it chose. 13 J. APPLEMAN, INSURANCE LAW & PRACTICE § 7401 (rev. ed. 1976). After questioning whether any ambiguity in the Revere-OPIC insurance contract had been shown, Judge Richey declared that "[p]ublic policy is involved in this case, but not in the manner the petitioner [Revere] contends. There is a strong public policy behind judicial enforcement of binding arbitration clauses." Order at 3, *reprinted in* J.A. at 449a. From this ruling Revere appeals. We affirm.

Revere's motion in the district court was made pursuant to sections 10 and 11 of the Federal Arbitration Act, 9 U.S.C. §§ 10-11 (1976). The Act was originally passed in 1925. Pub. L. No. 68-401, 43 Stat. 883. As stated in the Act's preamble, Congress intended it to be "An Act To make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations." *Id.* In the ensuing years, "[t]he federal courts have recognized a strong federal policy in favor of voluntary commercial arbitration, as embodied in the [Act]. . . ." *Hanes Corp. v. Millard*, 174 U.S. App. D.C. 253, 265, 531 F.2d 585, 597 (1976). The goal

of Congress in passing the Act was to establish an alternative to the complications of litigation. *See Wilko v. Swan,* 346 U.S. 427, 431 (1953) (citing House and Senate reports). As a result, judicial review of an arbitration award has been narrowly limited. *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.,* 274 F.2d 805, 808 (2d Cir.), *cert. denied,* 363 U.S. 843 (1960). This court has acknowledged its restricted function in that capacity. *See Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.,* 143 U.S. App. D.C. 210, 215, 442 F.2d 1234, 1239 (1971).

Seeking to avoid the restrictions upon our review of the award in question, Revere points to the rule that enforcement of arbitration awards is subject to public policy considerations. Revere misperceives the nature of the public policy exception to the enforcement of arbitration awards. It is not available for every party who manages to find some generally accepted principle which is transgressed by the award. Rather, the award must be so misconceived that it "compels the violation of law or conduct contrary to accepted public policy." *Union Employers Division of Printing Industry, Inc. v. Columbia Typographical Union No. 101,* 353 F. Supp. 1348, 1349 (D.D.C. 1973), *aff'd mem.,* 160 U.S. App. D.C. 403, 492 F.2d 669 (1974).[1] A proper description of the limits of the public policy exception is pro-

[1] We do not agree with Revere's contention that the formulation of the role of public policy in the judicial review of arbitration awards set forth in the *Union Employers* case is limited to the labor context. A looser standard in other settings would upset the basic goal sought by Congress in enacting the Federal Arbitration Act. Allowing undue challenges to arbitration awards would defeat the finality and speedy dispute resolution expected of the arbitration procedure. *Cf. Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.,* 143 U.S. App. D.C. 210, 214, 442 F.2d 1234, 1238 (1971).

vided in *Interinsurance Exchange of Automobile Club v. Bailes,* 219 Cal. App. 2d 830, 33 Cal. Rptr. 533, 538 (1963):

> While, in one sense, all rules of adjective and substantive law set forth the "public policy" of the state, there is a vast difference between the enforcement of a void contract and the mere misunderstanding or misapplication of rules of law involved in the application to a particular dispute of a [valid] contract . . . .

There being no question as to the validity of the insurance contract between Revere and OPIC, or the legitimacy of the parties' bargained-for performances, the public policy exception is inapplicable here.[2]

Revere argues that arbitration clauses are entitled to varying degrees of enforcement depending upon the subject matter of the contract in question. The Federal Arbitration Act provides no basis for this view. Section 9 of the Act expressly provides for the confirmation of arbitration awards which arise out of the kind of binding arbitration clause which is present in Revere's contract with OPIC. *See* 9 U.S.C. § 9 (1976). If indeed there are particular considerations that lead parties to different types of contracts to favor or disfavor arbitration, that is for the parties to determine when they decide whether to include an arbitration clause in their contract. It has nothing to do with the judicial enforcement of arbitration clauses pursuant to the Federal Arbitration Act. The strong federal policy in favor of voluntary commercial arbitration would be undermined if the courts had the final say on the merits of the award. *See* Note, *Judicial*

[2] Since the award here is not erroneous on its face, Revere's citation of *Campbell v. Farmers Insurance Exchange,* 260 Cal. App. 2d 105, 67 Cal. Rptr. 175 (1968), is inapposite.

Review of Arbitration Awards on the Merits, 63 HARV. L. REV. 681 (1950).

If Congress wanted to exempt insurance contracts from the purview of the Federal Arbitration Act in the manner suggested by Revere, Congress could do so. In fact, the cases cited by Revere to demonstrate that arbitration of disputes between customer and broker is disfavored, *Wilko* v. *Swan*, 346 U.S. 427 (1953) and *Ames* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174 (2d Cir. 1977), stand for the proposition that Congress can abrogate an arbitration procedure previously contracted for. Congress has done no such thing in the insurance area. On the contrary, in the Foreign Assistance Act of 1969, Congress expressly sanctioned the use of arbitration in OPIC's insurance and guaranty programs. *See* 22 U.S.C. § 2197(i) (1976). As Judge Fuchsberg cogently stated in a case relied upon by Revere, "The notion that courts may freely assume the role of arbiters of public policy is a very much exaggerated one. Most especially, they should avoid doing so in the face of a statutory scheme which bespeaks its own policy considerations . . . ." *Susquehanna Valley Central School Dist. v. Susquehanna Valley Teachers' Ass'n*, 37 N.Y.2d 614, 339 N.E.2d 132, 134 (1975) (concurring opinion).

We see no reason for holding that the failure of arbitrators to apply the rule of *contra proferentem* is sufficient cause for upsetting the award. In *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805 (2d Cir. 1960), the court was faced with a challenge to "arbitrators' reliance upon the principle that ambiguous language is to be construed against the author." *Id.* at 808. The court resolved the issue in declaring that "the misapplication . . . of such rules of contract interpretation does not rise to the stature of a 'manifest disregard' of law." *Id.*

Our disposition makes it clear that we do not find credence in Revere's claim that it was compelled to accept the arbitration provision in its contract with OPIC. This allegation appears to have surfaced after the arbitration award was announced.[3] Revere is willing, on the other hand, to let stand the arbitrators' majority decision in Revere's favor that the Jamaican government expropriated Revere's property. Such an after-the-fact, pick-and-choose approach to an arbitration award is hardly consonant with the underlying concept of arbitration or with Revere's claim that it was forced to agree to arbitration in the first place.

As for Revere's argument that the arbitrators "rewrote" the contract in excess of their authority, a cursory reading of the arbitration award indicates that it "draws its essence" from the Revere-OPIC contract. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

We are satisfied that the arbitration award should be sustained. The judgment of the district court, therefore, is

Affirmed.

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[3] Revere was the party that requested arbitration of the dispute. Revere's displeasure with the results is understandable, but the very purpose of the Federal Arbitration Act—to offer parties a mutually agreeable alternative to lengthy and costly litigation—would be defeated if this court upset the arbitrators' decision.

APPENDIX B

Opinion of the District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Filed Dec. 8, 1978, JAMES F. DAVEY, *Clerk*

Misc. No. 78-0296

REVERE COPPER AND BRASS INCORPORATED,

Petitioner,

v.

OVERSEAS PRIVATE INVESTMENT CORPORATION,

Respondent.

ORDER

Presently before the Court is a motion by petitioner Revere Copper and Brass Incorporated [hereinafter referred to as "Revere"] to correct, pursuant to 9 U.S.C. 11 (1976), and vacate, pursuant to 9 U.S.C. 10 (1976), portions of an award made in arbitration proceedings between Revere and respondent Overseas Private Investment Corporation [hereinafter referred to as "OPIC"] and captioned *In the Matter of: Revere Copper and Brass, Incorporated, and Overseas Private Investment Corporation,* Case No. 16 10 0137 76.

Revere invested in Jamaica by establishing a wholly-owned subsidiary called Revere Jamaica Alumina, Ltd. [hereinafter referred to as "RJA"] which operated a bauxite and alumina processing complex. In 1970, Revere

obtained expropriation insurance from OPIC to protect its investment in Jamaica from political risk. Section 10.01 of the insurance contract between Revere and OPIC provided that all disputes between the parties were to be resolved by arbitration and "[t]he award rendered by the arbitrator shall be final and binding upon the parties."

In August 1975, RJA shut down. Revere filed a claim with OPIC alleging that actions of the Jamaican Government—principally the imposition of a tax in June 1974—constituted expropriation within the meaning of the insurance contract. OPIC denied Revere's claim and initiated arbitration under the auspices of the American Arbitration Association. Three neutral arbitrators were selected to decide whether OPIC was liable to Revere and, if so, the amount of the liability.

One arbitrator felt that OPIC was not liable to Revere at all, while the majority of arbitrators found that Revere was entitled to receive compensation of $1,131,144. Revere is dissatisfied with the amount of the award, and has filed this action, arguing that the majority of the arbitrators exceeded their powers by: (1) making three adjustments which disregarded express terms of the insurance contract; (2) writing into the contract a term it does not contain; (3) giving to that term a meaning which it does not have; and (4) choosing a construction of the contract most favorable to the insurer and least favorable to the insured. According to the petitioner, these improper actions resulted in the writing down of the amount of Revere's equity investment, the amount recoverable under the contract, from $64,131,000 to $1,131,144.

The scope of review of an arbitrator's decision is extremely limited:

It is well-settled in this Circuit that an arbitration award will not be vacated

> [E]ven though the arbitrator may have made, in the eyes of judges, errors of fact and law unless it "compels the violation of law or conduct contrary to accepted public policy."

Union Employers Division, Etc. v. Columbia Typographical Union No. 101, 353 F. Supp. 1348, 1349 (D.D.C. 1973) (Richey, J.), *aff'd,* 492 F.2d 669 (D.C. Cir. 1974), *quoting Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.,* 442 F.2d 1234, 1239 (D.C. Cir. 1971).

Revere does not claim that the award is tainted by partiality, bias, corruption, or unfair proceedings, nor does Revere contend that the issues decided by the arbitrators were not within the scope of the submission. Instead, Revere's claims amount to no more than the contention that the arbitrators misconstrued the contract. However, the courts cannot correct misconstructions: "Whether the arbitrators misconstrued a contract is not open to judicial review." *Bernhardt v. Polygraphic Co. of America, Inc.,* 350 U.S. 198, 203 n.4 (1956).

In order to avoid this rule, Revere has made a convoluted argument that it has satisfied the rule that the arbitrator's award be set aside if it "compels the violation of law or conduct contrary to accepted public policy." *Union Employers Division, Etc., supra.* Revere's argument that the arbitrators' award violated public policy runs as follows: The arbitrators failed to apply the rule of *contra proferentem,* which requires that ambiguities in insurance contracts be resolved in favor of the insured; *contra proferentem* is

required by public policy; therefore, the arbitrators' failure to apply that rule violates public policy.

First, it is not at all clear that this rule of construction has been violated. There has been no showing that the contract was ambiguous other than a passing reference by the majority of arbitrators to the "force" of an alternative interpretation. Moreover, the rule in *Union Employers Division* requires that the arbitrators' decision must *"compel* the violation of law or conduct contrary to accepted public policy." (Emphasis added.) There has been no showing that the award of over $1 million would have any such result. Revere has failed to convince the Court that any error has occurred, and certainly the Court can find no error of the magnitude required by *Union Employers Division.*

Public policy is involved in this case, but not in the manner the petitioner contends. There is a strong public policy behind judicial enforcement of binding arbitration clauses. Accordingly, it is, by the Court, this 8 day of C.R.R. December, 1978,

ORDERED, that the petitioner's motion be, and the same hereby is, denied.

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Judge

APPENDIX C

Statutory Provisions

Federal Arbitration Act, 9 U.S.C. §§ 1, 2, 9, 10, 11 and 13 (1976)

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a non-resident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

Labor Management Relations Act, 1947
29 U.S.C. §§ 173(d) and 185 (1976)

§ 173. Functions of Service

• • •

(d) Use of conciliation and mediation services as last resort

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or inter-

pretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which

such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Internal Revenue Code, 26 U.S.C. § 482 (1976)

§ 482. Allocation of income and deductions among taxpayers

In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses.

APPENDIX D

OPIC Insurance Policy

221 K GT 11-65
Revised (Combined)

Agency for International Development

GENERAL TERMS AND CONDITIONS

(for Coverage A and Combined Coverages B and C)

which with

SPECIAL TERMS AND CONDITIONS

constitute a

CONTRACT OF GUARANTY

For Investment Guaranties Under Section 221(b)
of the Foreign Assistance Act of 1961, as amended

OPIC Insurance Policy

GENERAL TERMS AND CONDITIONS

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OPIC Insurance Policy

[Sections 1.22, 1.28, 2.09, 15.01, 17.01, 18.01, 18.03 of the OPIC Insurance Policy are annexed as an Appendix to the Arbitration Award. *See* pages 132a-134a *infra.*]

APPENDIX E

Award

AMERICAN ARBITRATION ASSOCIATION

Case No. 16 10 0137 76

In the Matter of:

REVERE COPPER AND BRASS, INCORPORATED

and

OVERSEAS PRIVATE INVESTMENT CORPORATION

AWARD

This Award is in five Parts:

Part One,	Liability Issues;
Part Two,	Compensation Issues;
Part Three,	Revere Claims for Reimbursement and Interest;
Part Four,	Amount of Award; and
Part Five,	Minority Opinion.

PART ONE

Liability Issues

I

Statement of Facts

This proceeding is an arbitration under the Commercial Arbitration Rules of the American Arbitration Association

between Revere Copper and Brass Incorporated, a Maryland corporation, (Revere) and Overseas Private Investment Corporation (OPIC) arising out of Contract of Guaranty No. 7230 between the U. S. Government's Agency for International Development (AID) and Revere, dated September 15, 1970. OPIC has succeeded AID as party to this Contract.*

The OPIC Contract relates to an investment made by Revere in its wholly-owned subsidiary, Revere Jamaica Alumina, Limited, a Maryland corporation, (RJA) for the purpose of financing RJA's construction and operation of "a bauxite mining operation, a plant to convert the bauxite to alumina and related facilities . . ." in Jamaica, West Indies.

Revere's Claim is for compensation under Coverage B of the OPIC Contract ("Expropriation") and reimbursement of expense. The basic issue for determination is whether Revere or its subsidiary RJA sustained losses which resulted from "Expropriatory Action" as that term is defined in relevant provisions of Section 1.15 of the General Terms and Conditions of the OPIC Contract, as follows:

> "1.15. Expropriatory Action. The term 'Expropriatory Action' means any action which is taken, authorized, ratified or condoned by the Government of the Project Country, commencing during the Guaranty Period, with or without compensation therefor, and which for a period of one year directly results in preventing:
>
> • • • • •

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* This Contract will be hereinafter referred to as "the OPIC Contract" or simply "the Contract". It takes the form of Special Terms and Conditions signed by the parties and designated "221 KST 11-65 Revised (Combined)" and General Terms and Conditions, designated "221 KGT 11-65 Revised (Combined)".

"(b) the Investor from effectively exercising its fundamental rights with respect to the Foreign Enterprise either as shareholder or as creditor, as the case may be, acquired as a result of the Investment; provided, however, that rights acquired solely as a result of any undertaking or agreement with the Government of the Project Country shall not be considered fundamental rights merely because they are acquired from such undertaking or agreement; or

"(c) the Investor from disposing of the Securities or any rights accruing therefrom; or

"(d) the Foreign Enterprise from exercising effective control over the use or disposition of a substantial portion of its property or from constructing the Project or operating the same;"

Excluded is any action resulting from:

"(1) any law, decree, regulation, or administrative action of the Government of the Project Country which is not by its express terms for the purpose of nationalization, confiscation, or expropriation (including but not limited to intervention, condemnation, or other taking), is reasonably related to constitutionally sanctioned governmental objectives, is not arbitrary, is based upon a reasonable classification of entities to which it applies and does not violate generally accepted international law principles;"

Section 1.15 concludes:

"The abrogation, impairment, repudiation or breach by the Government of the Project Country of any undertaking, agreement or contract relating to the Project shall be considered an Expropriatory Action only if it constitutes Expropriatory Action in accordance with the criteria set forth in this section."

(a) *Agreement of March 10, 1967*

Revere's investment was made pursuant to an Agreement between the Government of Jamaica (hereinafter sometimes referred to as "the Government" or as "GOJ") and RJA, dated March 10, 1967 (sometimes referred to as "the Agreement"). This was preceded by a Heads of Agreement, dated January 26, 1967. The Agreement recited that the Government had "suggested" to RJA "that it construct an alumina plant in Jamaica"; that RJA, "having full confidence in the people of Jamaica and in the stability of their democratic form of government", was "willing to do so"; that "the contribution to be made by . . . (RJA) to the economy of Jamaica" was such that it was "entitled to have its capital investments in Jamaica, actual and potential, secured by reasonable safeguards on a long term basis some of which are hereby placed on record"; and that it was "desirable that they should be encouraged to commence operations in Jamaica and expand the same . . . ".

The Agreement provided that it should remain in force for 25 years from the earlier of the date of the commencement of commercial production of alumina from the plant to be constructed by RJA or from a date 2½ years from the date of the Agreement; that RJA have the option to substitute the terms of any arrangement or agreement between GOJ and any other person relating to bauxite or alumina (Cl.3); that GOJ would use its best endeavours to secure the enactment of legislation to give effect to the Agreement, including amendment of the Bauxite and Alumina Industries (Encouragement) Law (Cl.4); that

income tax liability and royalties should be determined as provided in Clauses 6, 7, 8 and 9 of the Agreement; that no tonnage tax, customs duty, excise duty or other similar impost shall be payable in respect of designated imported articles (Cl.10); that land taxes be governed by Clause 11; that no further taxes, burdens, levies etc. will be imposed except as stated (Cl.12); that the Agreement would remain in force 25 years for the purposes of taxation and royalties (Cl.13); that GOJ consent to and assist RJA as necessary to obtain AID guarantees (Cl.14); that GOJ sell to RJA lands reclaimed from the sea (Cl.15); that GOJ provide mining licenses etc. (Cl.16); that RJA make every reasonable effort to use Jamaican personnel, but be permitted to import technical and administrative personnel, contractors, etc. (Cl.17); that save as expressly provided "no obligation will be placed" on RJA and nothing will be done which will derogate from its right to own, operate, possess, use and realise the . . . property held in connection with the project" etc. (Cl.20); that bauxite reserves be made available (Cls.22 and 23); that mining leases be provided (Cl.24); that RJA have approved status and other benefits for exchange control purposes (Cl.26); and that RJA construct an alumina plant "by stages", the first stage to provide a capacity of at least 220,000 short tons of alumina per year and to be completed within three years, subject to extension for a further year, additional capacity to provide a total capacity of 660,000 short tons per year within ten years (Cls.27 and 28).

In anticipation of the Agreement, Revere had acquired licenses to prospect for bauxite in Jamaica. On April 10, 1967, these were converted to Special Mining Lease No. 60 issued under the Mining Law and Regulations. This leased certain areas to RJA for a period of 25 years, subject to

renewal for a further 25 years, and gave RJA the right to mine commercial bauxite sufficient to enable it to produce 21.83 million short tons of alumina, and certain additional quantities, all as provided in the Agreement to which the Lease referred.

Pursuant to the Agreement, RJA built a 220,000 ton per day alumina plant at Magotty in the Parish of St. Elizabeth. Operations commenced in June 1971; commercial production was obtained in December 1972. Investment in plant facilities and other fixed assets at December 31, 1974 was approximately $97,600,000; net book value was then $89,200,000. According to the Revere Claim, the total of equity investment and advances to RJA aggregated approximately $113,400,000.

Although annual capacity was never increased beyond 220,000 tons, negotiations were commenced in 1973 with a consortium of Japanese companies for construction of the next stage provided for in the Agreement and a letter of intent was signed on May 8, 1974. Neither this nor a subsequent project with the Government was ever consummated.

(b) *Political Developments in Jamaica*

Following Jamaica's independence in 1962, Sir Alexander Bustamente, leader of the Jamaican Labor Party, was Prime Minister until 1967, when he was succeeded by Hugh Shearer of the same Party. In the 1972 election, the Bustamente Party lost to the People's National Party, and the leader of the latter, Michael Manley, became Prime Minister.

Soon after his election, Manley, who is still Prime Minister, initiated a review of the bauxite and alumina industry. In October 1972, he told the United Nations General Assembly:

> "The time has come to reconstruct the basis on which the gains arising from the exploitation of . . . . resources are shared between those . . . . who provide the capital and technical know-how for the process of exploitation . . . . and those . . . . who own the resources and provide essential infra-structure and the labor force."

He later recorded that throughout 1973 "we were setting the stage at home and abroad for the response which we were to make in 1974". A national Bauxite Commission having been established in 1972, "an intensive investigation of the aluminum industry" proceeded in 1973 and led to a policy with four objectives:

(1) a drastic increase in revenues from bauxite mining and alumina production;

(2) recovery of bauxite ore leased to the mining companies;

(3) reacquisition of all lands owned by such companies; and

(4) national majority ownership and control of the bauxite industry.

The first of these objectives was achieved in June 1974 legislation, notwithstanding contractual prohibitions against increasing taxes and royalties. In a speech the Prime Minister made in August 1974, he said his government had transformed the aluminum industry's contribution to national revenue from $25 million to nearly $200 million dollars, adding that this had been accomplished through the "exercise of our rights as a sovereign and independent

state" and "by declaring what can and what cannot take place in this country".

It was clear that the Government was determined to proceed with the remaining objectives. As early as 1970, the Prime Minister had written that "the key" to economic independence for developing countries "must be in joint ownership". This was confirmed in his address to the Special Session of the United Nations General Assembly in April 1974 on the proposed Charter of Economic Rights and Duties of States, where he said that Jamaica called "upon the world community to formally resolve the restructuring of the world economic order, aimed at dismantling the old patterns of relationships" which had been, he said, "the instrument frustrating the development of the poor nations . . .". On May 15, 1974, a Government Press Release quoted the Prime Minister as saying:

> "The renegotiation of contracts with the aluminum companies is not only a necessity and the right of a sovereign nation, but an obligation to the people. These considerations outweigh the sanctity of contractual agreements."

On January 3, 1974, in a speech to the Jamaica Teachers Association, in which he addressed the critical energy situation, he had said that the fuel problem "could not be handled in a conventional manner". Contracts for products like sugar, bananas and bauxite had been signed when oil was $2.00 per barrel and not the current $14.00. "All of the fundamental equations have changed", he said, "and such contracts have been abrogated by history as the factors that made them relevant no longer exist". He added:

> "The Government of Jamaica cannot be bound by them any longer. For Jamaica to survive we must nego-

tiate new contracts and new benefits for our things sold abroad."

(c) *Contract Renegotiation Proposals in March 1974*

It was in this framework that the Prime Minister invited the heads of the six aluminum companies to meet him in Jamaica on March 15, 1974.

At the meeting the Prime Minister pointed out that recasting the arrangements with the aluminum industry had been an announced policy of his party since 1970 and of his Government since it assumed power in 1972. He wished to assure the companies, however, as he had assured Prime Minister Trudeau and Secretary Kissinger, that negotiations would take place within the limits of international law and practice. The Government did not intend nationalization or anything like it. What was needed was greater revenue, improved balance of payments, more rapid exploitation of reserves and increased refining capacity. On the political side, times had changed since his father had made the existing arrangements with the industry. Nationalization was not the answer, but "a real working relationship" with the industry was. His ultimate objective was 51% ownership by the Jamaican people: the Government itself would get out of the business.

The mildness of this session was in contrast with the peremptory nature of the written demands served on the companies on the same day. These appeared to be non-negotiable, although the chief negotiator Matalon insisted in testimony to the Panel that all points were in fact negotiable. Each set of "proposals", as they were termed, was divided into two parts: revenue proposals and local participation in the industry. The various sets were all similar but not identical. In the case of those served on Revere,

the revenue proposals stated that a "production levy will be introduced effective and payable 1st January 1974". This would be $14 (Jamaica) per long dry ton of bauxite mined and processed into alumina in Jamaica. Royalties would be replaced by a flat rate of J$1 per long dry ton of bauxite processed locally. Depletion allowances "will discontinue effective 1st January 1974. OPIC premiums will not be allowed as a deductible expense". "The Government reserves the right" to disregard contractual provisions calling for most favoured company treatment. All foreign exchange "must be sold" to an authorized depository. All overseas payments "must be made" from a Jamaica bank account and subject to Exchange Control approval.

In the case of "Local Participation" it was stated to be the Government's policy:

> "to secure maximum national ownership of and effective national control over the bauxite and alumina enterprises operating in Jamaica."

All surface rights were to be purchased from RJA. As regards bauxite mining, it was stated that the Government "had decided to revoke all existing mining leases and licenses". It was then stated that the Government "will immediately enter into" a contract to provide bauxite supplies for 20 years and to issue five year mining licenses. Majority local equity participation would be negotiated.

In a subsequently negotiated Heads of Agreement of December 20, 1974, Revere agreed to some of the Government proposals, but these Heads were expressly subject, *inter alia,* to approval by Parliament of such legislation as might be required, to approvals by Revere's Board, RJA and "lending institutions", and to mutual agreement of the terms necessary to carry out the Heads. No definitive

arrangement was ever concluded, as RJA was unable to obtain participation by a Japanese Consortium with which it had been negotiating, and for economic reasons RJA was forced to shut down its plant in August 1975. In return for RJA's agreement to obtain a feasibility study for an expansion of 601,000 short tons of alumina capacity, the Government agreed in the Heads to a "subvention" from the Levy of $5 (U.S.) per long dry ton of bauxite for the calendar year 1974. The study was completed and the levy reduced accordingly.

(d) *The Bauxite Levy*

Although intense negotiations took place between the companies and the Government during March, April and May, 1974, it was soon evident that the nature of the levy and, to a high degree, the amount, were not negotiable. No agreement having been reached by May 15, the Prime Minister then submitted the Government's proposals to Parliament and on June 8, 1974 the Bauxite (Production Levy) Act, 1974, was enacted. This imposed a tax on bauxite at a rate to be determined from time to time, the initial rate being 7.5 per cent. This rate was to be applied to "the average realized price . . . for primary aluminum" to be designated annually by Ministerial orders and the result divided by 4.3 to relate to the bauxite equivalent. Initially, the rate for 1974 was $11.16 per ton of bauxite. This was increased in 1975 to $12.65, in 1976 to $15.62, and in 1977 to $17.86. The Act was "deemed to have come into operation on the 1st of January, 1974" and provided that nothing in "any law, enactment or agreement . . . shall be construed as derogating from this Act or any obligations arising thereunder, or give rise to any cause of action in

respect of any act done in accordance with this Act or regulations thereunder".

Section 4 of the Act prescribed minimum quarterly quantities of bauxite which each producer was deemed to have produced during that quarter and provided that each such producer should provisionally pay to the Collector General the sum of money arrived at by multiplying such minimum quantity by the basic rate set out in the First Schedule. The impact of the Levy could, therefore, be severe if production fell substantially below the prescribed minimum or ceased entirely. In the case of Revere the minimum quarterly amount of 111,250 tons was close to its then current rate of production. If Revere had operated at a lower rate or the Levy had been imposed notwithstanding the later shutdown, the effect would have added substantially to the burden. The Supreme Court of Jamaica held, however, that the Levy was not applicable during any calendar year when Revere produced no bauxite, as the imposition was upon bauxite extracted or won and not upon the producer. For that reason Revere made no payment for any period after December 31, 1975. For the period from January 1, 1974 to December 31, 1975, Revere paid $9,494,000.

The Act provided that the Minister was not only to determine each year the "average realized price . . . for primary aluminum for the last preceding year" but was also empowered by Section 5 to issue orders changing the current rate and the minimum quantities, every such order to be subject to affirmative resolution of the House of Representatives. The Minister was also empowered to waive, remit or refund any levy in whole or in part and subject to such conditions as he might impose.

(e) *Amendment of the Mining Act*

On June 17, 1974 the Mining Law was amended by the Legislature so as to add a new Section 45C and to amend Section 95 with respect to making regulations. The former empowered the Minister by order to require the holder of a mining lease to extract minimum quantities as might be prescribed and to provide that any such requirement

> "shall, while such requirement remains in force, be deemed to be a condition subject to which any holder of a mining lease or special mining lease to whom the requirement relates holds such mining lease or special mining lease."

The latter empowered the Minister, notwithstanding "anything in any law, enactment or agreement" to make regulations giving effect to provisions of the Mining Law and accordingly provided that

> "nothing in any such law, enactment or agreement shall be construed as derogating from regulations made under this Law or any obligations arising under such regulations or give rise to any cause of action in respect of any act done in accordance with this Law or regulations made thereunder."

Pursuant to this Act the Minister of Mining and Natural Resources issued Regulations on June 21, 1974, increasing the rate of royalty payable under bauxite leases to 50 cents per ton, retroactive to January 1, 1974. From April 1, 1982, the rates of royalty on bauxite processed into alumina in Jamaica would be adjusted upward or downward in direct proportion to any increases or reductions of the

New York published price for aluminum ingot above or below 24.5 cents per pound.

On July 29, 1974, the Minister issued an Order under the Mining Law, in exercise of the authority granted by Section 45C, that

> "Each holder of a mining lease or a special mining lease named in the . . . . Schedule hereto shall, during each quarterly period, extract or win not less than the number of tons of bauxite or laterite specified in respect of such holder. . . ."

The amount specified for RJA was 111,250 tons. This Order was revoked on September 19, 1974. No explanation has been given to us for this revocation.

(f) *Shutdown of the RJA Plant—Claim Against OPIC*

Revere reported a loss for the first quarter of 1975 of 26 cents a share as compared with a profit of 60 cents a share in 1974. In the case of the RJA operations, losses were reported to the Government of $1.5 to $2 million dollars in each of the first four months of 1975. In May notice was given that RJA had decided to shut down the plant "as a result of economic necessity". Despite strenuous efforts by the Government to find some way of avoiding a shutdown, including relief from the Bauxite Levy for the balance of 1975, operations at the plant ceased on August 19, 1975. Subsequent efforts to dispose of the property to the Government or to work out an expansion that might make its operations profitable failed. The plant has remained closed since August 1975, and throughout this proceeding.

On January 13, 1976, RJA instituted legal proceedings against the Government in the Supreme Court of Jamaica

for a determination that the Bauxite Levy was a breach of the Agreement and for an injunction against its imposition. The Court denied the claim of breach, but held that the Levy could not be imposed when RJA was not producing bauxite. The judgment is on appeal.

On April 14, 1976, Revere submitted to OPIC its Application for Compensation, alleging that Expropriatory Action had been taken by the Government within the definition of that term in Section 1.15 of the OPIC Contract. On December 21, 1976 this arbitration proceeding was instituted.

A preliminary hearing was held on June 21, 1977. Thereafter approximately four weeks of hearings on liability issues were held during which ten witnesses were heard and extensive arguments of counsel were received. The stenographic record on such issues consists of about 4,400 pages and more than 600 exhibits were submitted.

II

Liability Issues Presented by the Revere Claim

Revere claims that three subsections, (b) (c) and (d), of Section 1.15 of the OPIC Contract are applicable. We accept OPIC's contention that, if Revere has a claim at all, it falls under (d). This requires us to determine whether any action of the Government of Jamaica directly resulted in preventing RJA for a period of one year "from exercising effective control over the use or disposition of a substantial portion of its property or from constructing the Project or operating the same".

On this point Revere contends that a series of governmental acts during the first six months of 1974, including

the revenue and mining law measures adopted in June of that year, effectively abrogated the 1967 Agreement between the Government and RJA, thereby ending the contractual security provided by that Agreement, and that this brings its claim under subsection (d).

Revere further contends that the exclusions of paragraph (1) of Section 1.15 do not apply because the actions of the Government violated generally accepted principles of international law and that the final paragraph of Section 1.15 is inapplicable because the actions of the Government fall within subsection (d).

OPIC contends to the contrary on all points. The Jamaican Government, it says, has neither taken nor deprived Revere of control over Revere's investment or project. The argument continues that the Bauxite Levy did not prevent RJA from exercising effective control; it did not deprive RJA of a substantial portion of its property because the Levy could be passed through to the ultimate consumer; as for the breach of contract argument, this is not a basis for determining Expropriatory Action under the OPIC Contract; and there was anyway no breach here, as the 1967 Agreement was clearly governed by Jamaican law and the Supreme Court of Jamaica rejected RJA's claim of breach on the ground that the prohibitions against increased taxes and royalties were void *ab initio*.

On the facts, we recognize that RJA is still in possession of its plant and other properties and that it shut down its plant in 1975 for economic reasons and not because the Government had physically intervened in the affairs of RJA so as to prevent it from using or disposing of its property. We also accept OPIC's contention that a mere breach of contract does not trigger the compensation provisions of the OPIC Contract and that, if a breach is relied

upon as a ground for applying Section 1.15(d), the action taken by the Government must directly prevent the exercise of effective control.

We do not agree with OPIC, however, that the abrogation argument is "nonsense". From a careful analysis of the facts, we are convinced that the Government of Jamaica intended to abrogate the 1967 Agreement and that it effectively did so notwithstanding continued references to portions of the Agreement and efforts by both parties to negotiate new terms. We do not agree that the decision of the Supreme Court of Jamaica that Clause 12 was not binding on the Government of Jamaica determines the question of breach for the purposes of the OPIC Contract. Our reasons for concluding that the 1967 Agreement on the basis of which Revere made its $97 million investment in Jamaica is or was governed by principles of international law as well as by the law of Jamaica are elaborated below. A majority of this Panel have concluded that the actions taken by the Government of Jamaica, having effectively put an end to the 1967 Agreement, directly prevented RJA from exercising effective control over the use or disposition of its property.

It seems to the majority convenient to deal first with this question of abrogation; for if this did not occur and the Agreement remained intact, it would not be necessary to consider whether abrogation produced the effects required by Section 1.15(d). Whether the June 1974 legislation was a breach of the 1967 Agreement in turn depends on whether Jamaican law alone was applicable; for if it was, the decision of the Supreme Court effectively ruled out this ground for contending that there was a breach. While other actions of the Government compounded the effects of the June 1974 legislation and in our view evidenced repudiation, the Bauxite Levy, the increase in royalty and the amendment of the Mining law constituted the major breach and demonstrated the Government's disregard of its commitments. If these actions were exempt from the limitations of the 1967 Agreement on the ground of parliamentary privilege, it is difficult to understand how any other actions by the Government with respect to the Agreement would not also be exempt.

In the majority view, the law of Jamaica is not the only law to be considered by this Tribunal. Although the Agreement was silent as to the applicable law, we accept Jamaican law for all ordinary purposes of the Agreement, but we do not consider that its applicability for some purposes precludes the application of principles of public international law which govern the responsibility of States for injuries to aliens. We regard these principles as particularly applicable where the question is, as here, whether actions taken by a government contrary to and damaging to the economic interests of aliens are in conflict with undertakings and assurances given in good faith to such aliens as an inducement to their making the investments affected by the action.

A traditional international law approach has been to leave questions of breach of contract to the municipal law governing the contract (See Amerasinghe, State Responsibility for Injuries to Aliens (1967), at 66 to 99). In recent years, however, a series of decisions by Arbitration Tribunals, applying the views of outstanding international jurists, has developed an exception to this narrow approach where contracts fall within a category known as long term economic development agreements. In such cases, the question of breach is not left to the determination of municipal courts applying municipal law. The reason for this is that

such contracts, while not made between governments and therefore wholly international, are basically international in that they are entered into as part of a contemporary international process of economic development, particularly in the less developed countries. The very reason for their existence is that the private parties entering into such agreements and committing large amounts of capital over a long period of time require contractual guarantees for their security; governments of developing countries in turn are willing to provide such guarantees in order to promote much needed economic development. Moreover, while the agreements are entered into between governments and private parties, the governments of such parties are very much interested in such agreements and in promoting their conclusion. In this instance the government of the investor provided its own guarantee for the investment in addition to the contractual guarantee furnished by the foreign government.

A majority of the Panel has concluded that the 1967 Agreement falls within this category of a long term economic development agreement and that principles of public international law apply to it insofar as the government party is concerned and therefore that the question of breach by such party cannot be determined solely by municipal law. Whatever the position may be under municipal law, it would be contrary to well established principles of international law to leave the question of State responsibility to the alien party to the determination by that State as to what it lawfully could or could not be (See Amerasinghe, *op. cit.*, at 100 to 103). We do not question the decision of the Supreme Court of Jamaica, although there are indications in other English cases that the *Amphitrite* doctrine should be given a limited rather than a broad application.

Parliamentary supremacy and State sovereignty cannot, however, be the decisive criteria where the contract involved is international in nature and falls within the category of a long term economic development agreement. It is this developing area of international law that we shall first examine.

(a) *Applicability of International Law Principles*

A pioneer effort to establish the international illegality of a contract breach by a government which had guaranteed a long term concession agreement was made by the United Kingdom in its appeal to the international Court of Justice in the *Anglo-Iranian Oil Company Case* (I.C.J. Pleadings, 1952, pp. 64 to 280). In its Memorial to the Court, the United Kingdom Government said:

> "The Government of the United Kingdom does not dissent from the proposition that a State is entitled to nationalize and, generally, to expropriate concessions guaranteed to foreigners to the same extent as other property owned by foreigners. The exercise of that right, with regard to concessions and other property rights, is, however, subject to limitations clearly established by international practice and resting on well-recognized principles of international law. These limitations include, in particular, the principle that a State is not entitled to nationalize a concession if, by . . . a provision in the contract of concession, it has expressly divested itself of the right to do so . . .". (Pleadings, at 85)

In that case the Iranian Government had agreed that the concession "shall not be annulled by the Government and

the terms therein contained shall not be altered either by general or special legislation in the future, or by administrative measures or any other acts whatever of the executive authorities". That provision, the British Government argued, was inserted with the specific object of making it legally impossible for the Government of Iran to put an end to the concession by "some such measure of nationalization".

There was no such provision in the RJA/GOJ Agreement of March 10, 1967, but the Government of Jamaica did in that Agreement expressly agree in Clauses 12 and 13 that:

> "12. No further taxes . . . burdens, levies . . . will be imposed on bauxite, bauxite reserves, or bauxite operations . . . ".
>
> "13. For the purposes of taxation and royalties the provisions of this Agreement shall remain in force until the expiry of twenty five years . . . ".

It is difficult to see the difference in principle between one disabling clause and another so far as the legality of an abrogation is concerned. In both cases the argument is made that a State cannot fetter its future legislative action. In both the legislature acts contrary to the contractual limitation, annulling it and overriding it. In both the municipal law supports the action taken by the executive and the legislature. In both the question is raised whether on an international or transnational level the express undertaking of the State can be lawfully repudiated.

It was also argued in the dispute between the *Government of Saudi Arabia and the Arabian American Oil Company*, 27 Int'l Law Rep'ts 117 (1958) that the exercise of

sovereign power contrary to a government's contractual commitments could not be curtailed by resort to principles of international law. In that case the Concession Contract to which the Oil Company (Aramco) was a party did not specify what law was applicable to it. Nor did it provide for arbitration. After the Government decided to grant exclusive transportation rights to another party and Aramco protested that this would be a violation of its contract, the Government and Aramco agreed to refer the matter to an arbitral tribunal to be established in Switzerland. This agreement instructed the tribunal to decide the question in accordance with Saudi Arabian law "insofar as matters within the jurisdiction of Saudi Arabia are concerned", but "in accordance with the law declared by the Arbitration Tribunal to be applicable insofar as matters beyond the jurisdiction of Saudi Arabia are concerned" (*id.*, at 153, 154).

Although the Government there contended that, in the exercise of its sovereign regulatory powers, it had the power and the right to determine how oil should be transported from its territory, the tribunal found it "necessary to resort to the general principles of law and to apply them in order to interpret, and even to supplement, the respective rights and obligations of the Parties" (*id.* at 168). The law of Saudi Arabia, it said, "must, in case of need, be interpreted or supplemented by the general principles of law, by the custom and practice in the oil business, and by notions of pure jurisprudence. . . . " (*id.*, at 169); and that "interpretation of the Agreement should not be based" on Saudi Arabian law alone but should be "governed by principles of logic and common sense" (*id.*, at 172). It reached this conclusion after applying "objective criteria" and finding that "The Aramco Concession Agreement signed by the Government of Saudi Arabia and an American corporation

has, because of its Parties and its ramifications, an international character" (*id.*, at 166).

It was this concept of the international contract that was later adopted and developed by Professor Dupuy in the arbitration between *Texaco Overseas Petroleum Company nad California Asiatic Oil Company and The Government of the Libyan Arab Republic*, decided on the merits on 19 January 1977, 17 Int'l. Legal Materials 1 (Jan. 1978).* Although the case is distinguishable from the present one in that the contract called for arbitration outside the country and was to be governed by principles of Libyan law common to principles of international law and, lacking conformity, by general principles of law (and OPIC adds a further distinction between a "concession" and a "contract of guaranty" which is discussed below), nevertheless the arbitrator's analysis of the international nature of long term economic development contracts is pertinent. In his view it was

> "incontestable that these contracts were international contracts, both in the economic sense because they involved the interests of international trade and in the strict legal sense because they included factors connecting them to different States, an international contract having been recently defined as being 'that contract whose elements are not all located in the same territory' . . . ." (*TOPCO/Libya Award*, at 20).

Traditionally, contracts between States and foreign private parties had been regarded as necessarily governed by

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* This is an English translation of the original French text of the Award on the Merits. It is hereinafter referred to as the *"TOPCO/Libya Award"*. References herein are to pages in the printed booklet distributed by Revere at the hearings (Cl.Ex.300).

some municipal law (*Serbian and Brazilian Loans Case*, [1929] P.C.I.J., Ser. A, No. 20, at 41). More recently, however, according to Professor Dupuy, "juridical analysis has been much refined in this field". Contractual practice, he says,

> ". . . tends more and more to 'delocalize' the contract or, if one prefers, to sever its automatic connections to some municipal law: so much so that today when the municipal law of a given State, and particularly the municipal law of the contracting State, governs the contract, it is by virtue of the agreement between the parties and no longer by a privileged and so to speak mechanical application of the municipal law . . ." (*TOPCO/Libya Award*, at 24).

In his view, contracts have been "internationalized" either by reference in them to the settlement of disputes by "general principles of law" or by the character of the contract itself. In this latter respect he refers to such characteristics of these agreements as their broad subject matter, their introduction into developing countries of investments and technical assistance, their importance in the development of the country concerned, their long duration implying "close cooperation between the State and the contracting party" and "requiring permanent installations as well as the acceptance of exclusive responsibilities by the investor", and the close association of the foreign contractor "with the realization of the economic and social progress of the host country". Because of the required cooperation between the contracting party and the State "and the magnitude of the investments to which it agreed", the contractual nature of the legal relation "is intended to bring about an equilibrium between the goal of the general

interest sought by such relation and the profitability which is necessary for the pursuit of the task entrusted to the private enterprise". Thus, the effect of the contract is to ensure to the private party

> "a certain stability which is justified by the considerable investment which it makes in the country concerned. The investor must in particular be protected against legislative uncertainties, that is to say, the risks of the municipal law of the host country being modified, or against any government measures which would lead to an abrogation or recission of the contract. Hence, the insertion . . . of so-called stabilization clauses: these clauses tend to remove all or part of the agreement from the internal law and to provide for its correlative submission to *sui generis* rules as stated in the *Aramco Award*, or to a system which is properly an international law system." (*id.*, at 31 to 36)

We find this analysis persuasive as regards the question of internationalization of the Agreement between RJA and the Government of Jamaica. Thus, we note that the parties were of different nationalities: the Government of Jamaica, on the one hand, and a Maryland corporation of the United States, on the other. The Company was to construct an alumina plant in Jamaica at the suggestion of the Government.* Private capital was to be raised outside Jamaica and invested there. According to the preamble, this contribution of about 125 million dollars to the economy of Jamaica entitled RJA

> ". . . to have its capital investments in Jamaica, actual and potential, secured by reasonable safeguards on a long term basis some of which are hereby placed on record . . . ".

The capital was raised in the United States, on a long term basis. Revere made a public issue to its stockholders in December 1967 of $55,059,300 of 5½% Convertible Subordinated Debentures due 1992, the Prospectus describing the Jamaica bauxite mining and alumina plant project as part of a $168,000,000 primary aluminum project involving an issue also of $97,000,000 of Industrial Development Revenue Bonds for the construction of a 112,400 ton aluminum reduction plant near Scottsboro, Alabama. This complex of bauxite mining and alumina production in Jamaica, designed to produce 220,000 short tons of alumina per annum, and aluminum ingot production in Alabama was thus truly an international production operation. The raw material processed into alumina in Jamaica moved from there to the United States where it was reduced to aluminum ingot. After being rolled and fabricated into sheets, strips, tubes and forgings, a wide range of household and industrial products were then sold in the United States and abroad.

All of the elements which were found by the *TOPCO/Libya Award* to characterize "economic development agreements" are thus found in the RJA/GOJ Agreement of March 10, 1967. Its subject matter was broad: a major alumina plant in stages, first of at least 220,000 tons to be expanded to 660,000 over ten years from the commencement of commercial production; commercial bauxite was

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* After worldwide investigations Revere had determined to obtain bauxite in Jamaica if possible, but the policy of the Jamaican Government at that time was to urge, if not to require, the conversion of bauxite into alumina in Jamaica rather than permit the direct export of bauxite, thus, it was hoped, contributing significantly to the economic development of the country.

to be made available "to the extent necessary to support the total expanded capacity of the major alumina plant over a period of not less than forty (40) years, that is, reserves of commercial bauxite sufficient to produce 21.88 million short tons of alumina" etc.; mining leases were to be issued over certain lands for a term of 25 years, with a right of renewal for a further 25 years; RJA brought to Jamaica technical assistance and training and assumed a real importance in the development of the country; roads, housing and other facilities were built; and the project became closely associated with the economic and social progress of Jamaica. The Agreement was of long duration: "until the expiry of twenty-five years" from the earlier of the date of commencement of commercial production of alumina or a date two and one-half years from the date of the Agreement. Finally, the aim was to bring about an equilibrium between the general interests of the Government, on the one hand, and the protection of RJA, on the other; hence, the elaborate provisions relating to stability of financial requirements, with particular reference to taxes, allowances, exchange controls, import duties, etc.

Internationalization also resulted from the fact that Revere's investment in the Jamaica Project was insured by OPIC under the Foreign Assistance Act of 1961, as amended, and pursuant to the U. S. Government's long term program for economic assistance to less developed countries. As the Handbook of the A.I.D. Specific Risk Guaranty Program in effect in October 1966 (shortly prior to Rever's Heads of Agreement with GOJ in January 1967) stated in its introduction:

> "The Specific Risk Investment Guaranty Program . . . is designed to encourage private United States capital and know-how to participate in furthering the economic development and increasing the productive capacities of underdeveloped countries.
>
> * * * * *
>
> "By furnishing coverage against the principal political risks that accompany investments in less developed countries at modest cost, the specific risk guaranty program attempts to increase the participation by United States private enterprise in the growth of the economies of these countries. Increased private investment in these countries augments the production of wealth, expands employment, creates new markets, increases standards of living, and gives new skills to people in areas where such action is badly needed.
>
> "The United States Government recognizes the vital role which U. S. business can play in assisting other countries develop towards self-sufficiency. This program is designed to encourage the transfer to less developed countries of the capital and techniques that helped this country to grow and thus assist the objectives of the United States foreign aid program."

This Handbook also recorded Guaranty Agreements between the United States and more than 75 developing countries pursuant to this program. Jamaica was one of these countries. The Agreement between it and the United States provided, *inter alia:*

> "1. The Government of the United States of America and the Government of Jamaica shall, upon the request of either Government, consult concerning investments in Jamaica which the Government of the United States of America may guaranty.

"2. The Government of the United States of America shall not guaranty an investment in Jamaica unless the Government of Jamaica approves the activity to which the investment relates and recognizes that the Government of the United States of America may guaranty such investment.

"3. If an investor transfers to the Government of the United States of America, pursuant to an investment guaranty, (a) lawful currency, including credits thereof, of Jamaica, (b) any claims from the business activities of the investor to payment under the investment guaranty, or (c) all or part of the interest of the investor in any property (real or personal, tangible or intangible) within Jamaica, the Government of Jamaica shall recognize such transfer as valid and effective."

As required by paragraph 2 above, the Government of Jamaica on 28th January 1969 approved the RJA investment for the purposes of the AID Investment Guaranty Program. The result of this was clearly to internationalize the Revere investment in Jamaica, particularly as all rights acquired by OPIC upon paying a claim, such as the Revere claim, becomes rights of the U. S. Government under the above quoted paragraph 3.

Having thus concluded that the Agreement of March 10, 1967, was an international contract, we decide that the law applicable to it was not solely the domestic law of Jamaica but that principles of international law are applicable, particularly as regards the "so-called stabilization clauses" referred to by Professor Dupuy. In the case of the RJA Agreement, Clauses 12 (no further taxes) and 20 (security of investment) are of particular relevance in this respect.

In addition to prohibiting any derogation from RJA's "right to own, operate, possess, use and realise" its plant and other property, the latter pecifically provided that "no obligation will be placed on the Company". These clauses were clearly designed to further the general policy of the Government to encourage the investment of capital from abroad and to secure it against changes in governmental policies and attitudes toward foreign investors.

In this connection, it is pertinent to note the observations made by Professor Fatouros in his book *Government Guarantees to Foreign Investors* to which OPIC refer in another connection:

> "In some cases . . . investors may be willing to take the risk of a future worsening of investment conditions, especially when they are reasonably confident of their ability to defend effectively their own interests or when the expected profits are high enough to warrant taking the risk. . . . But in other cases, and in particular with respect to those industries whose establishment is sought by capital-importing states . . . , some assurance as to the future is needed. The investor must be made to believe that there is little or no possibility that an unfavorable legal situation will be created at a later date . . . . In the case of most underdeveloped countries today, however, it is impossible to predict with confidence that conditions of stability and security will exist during the period of dynamic change ahead. Thus arises the need for legal guarantees to be given by the State or states concerned to foreign investors . . . Foreign investors have to be assured that they will receive, both today and in the future, a definite legal treatment, specified in the relevant legal instruments, and that consequently they need not fear any major

changes in local legal or political conditions that would be unfavorable to their interests." (p.63)

Having thus concluded that the Agreement of March 10, 1967 was an internationalized contract and, therefore, that international law principles are applicable, we consider next what principles govern the question of abrogation.

(b) *Applicable Principles of International Law*

In 1962 the United Nations General Assembly adopted Resolution 1803 (XVII) relating to "Permanent Sovereignty Over Natural Resources" which provided

> "Foreign investment agreements freely entered into by, or between, States shall be observed in good faith." (57 Am. J. Int'l. L. 710, 712 (1963)).

This is a basic principle of international law notwithstanding subsequent efforts in the United Nations to limit its applicability. The *TOPCO/Libya Award* deals with these efforts at some length. At page 71 of the Award, Professor Dupuy says:

> "While Resolution 1803 (XVII) appears to a large extent as the expression of a real general will, this is not at all the case with respect to the other Resolutions mentioned above . . . . In particular, as regards the Charter of Economic Rights and Duties of States, several factors contribute to denying legal value to those provisions of the document which are of interest in the instant case."

After reviewing distinguishing features, the Award concludes that the later concepts cannot be regarded as more

than a *de lege ferenda* formulation, which even appears *contra legem* in the eyes of many developed countries:

> "One should conclude that a sovereign State which nationalizes cannot disregard the commitments undertaken by the contracting State: to decide otherwise would in fact recognize that all contractual commitments undertaken by a State have been undertaken under a purely permissive condition on its part and are, therefore, lacking of any legal force and any binding effect . . . such a solution would gravely harm the credibility of States since it would mean that contracts signed by them did not bind them; it would introduce in such contracts a fundamental imbalance because in these contracts only one party . . . would be bound. In law, such an outcome would go directly against the most elementary principle of good faith and for this reason it cannot be accepted." (*TOPCO/Libya Award*, at 73, 74)

These observations are relevant in this case. The argument is made by OPIC that Revere knew or should have known that the Government undertakings in Clause 12 were not binding on the Government of Jamaica and could not have been binding under the law governing the Agreement. Chief Justice Smith said in his Judgment:

> "I have not the slightest doubt that . . . the view of the government's representatives regarding Clause 12 was made clear to, at least, the plaintiff company's Jamaican lawyers. It is extremely unlikely that the lawyers did not communicate this view to their clients."

But even if Revere was aware of the Government's position with respect to Clause 12, does this mean that the pro-

visions of that Clause were not binding as a matter of international law? The answer to this important question requires an examination of the history of the Government's position on the matter of limiting its taxing powers with respect to the aluminum companies.

As early as 1957, or ten years before Revere entered Jamaica, the Government negotiated a "package deal" with Reynolds and Kaiser on the matter of tax stability. This arrangement was to last for 25 years and included a formula for determining the rate of profit assessable for income tax purposes, a ceiling for all taxes of 45% of profits, rates of royalty, and a provision that

> "No further taxes will be imposed on bauxite, bauxite reserves, or bauxite operations, or any assets used in bauxite operations or dividends on bauxite operations."

The emphasis was on increasing the Government's share of profits by way of income tax. It was then recognized that "it was not in Jamaica's interest to create a situation in which it could be said that we have broken an agreement about income tax by imposing a royalty . . . out of line with the royalties that prevail throughout the world". The new 25 year arrangement accordingly focused on increased income taxation for Jamaica. One of the predominant considerations was "to maintain the probability that the companies would continue to enlarge their operations in Jamaica and would look to Jamaica as the principal source of supply".

Both Reynolds and Kaiser were told, however, that "the Government did not consider a 25-year income tax arrangement as a sensible arrangement". Circumstances might change to make this unrealistic. In that event "it would be natural to expect that Government would approach the companies with a view to reopening the matter". Indeed, the companies were told that ". . . it would be the duty of Government to denounce any long-term agreement of this character which had become unrealistic and which was having the result of depriving the country of a share in the profits to which it was entitled".

The Report of the 1957 negotiations records that, in response to the companies' insistence that the Government enter into "a binding agreement that no other taxes would be imposed on their mining operations", they were told that "no Government could bind a future Government not to exercise its legislative powers and that legislation itself could put an end to any agreement of that sort". The companies, it was reported, "quite naturally insisted that they would derive protection from an agreement which the Government would be expected to observe". Although "the Chief Minister pointed out over and over that he could make no agreement which would propose to bind the future legislative action of the Government", it was acknowledged that the provisions in question would "have to be regarded as a matter of good faith and a civilised government would not be likely to repudiate this undertaking". The conclusion of this part of the Report says:

> "The assurances in the Agreement, therefore, are to be regarded as binding in good faith on the Government but not in any way an unrealistic promise to the company, namely, that no future legislation can be passed affecting them."

When asked by Kaiser to incorporate the agreement in legislation, the Minister said "he saw no virtue in . . .

(this) request . . . because this gave the Company no greater protection inasmuch as such a law could subsequently be repealed by the Government, present or future". Thus, the companies were told that the agreement was "binding in good faith" but the legislature was free to change it at will.

Counsel for Reynolds said that he would "not agree that it is impossible for a Government to contract in respect of the future exercise of executive authority" or that it was "impossible to make any contract which the Legislature of Jamaica could not nullify by a Statute". Counsel went on to say:

> ". . . what we are aiming at is a contract; so that if the Legislature did propose to pass a Statute nullifying the contract, they would have to do so in the face of the fact that by so doing, they were acting in bad faith and breaking a bargain."

It seems to us that both parties understood the situation. Chief Justice Smith in finding Clause 12 "invalid" and conferring "no valid contractual right" nevertheless said:

> "On the available evidence, the parties to the 1967 Agreement regarded it as a legally binding contract up to the enactment of the Acts of 1974. It is inconsistent with that conduct to plead now a lack of intention to create legal relations in order to upset the Agreement."

The international law rule that a government is bound by its contracts with foreign parties notwithstanding the power of its legislature under municipal law to alter the contract has been repeatedly asserted in important international arbitrations and elsewhere. Thus, in the *Shufeldt*

case (*United States* v. *Guatemala,* II U.N.R.I.A.A. 1079, Sir Herbert Sisnett, 1930) the Sole Arbitrator said with reference to a decree of the Legislative Assembly of Guatemala directing the Executive to take possession of lands covered by a chicle concession:

> ". . . it is perfectly competent for the government of Guatemala to enact any decree they like and for any reasons they see fit, and such reasons are of no concern to this Tribunal. But this Tribunal is only concerned where such a decree based even on the best of grounds works injustice to an alien subject, in which case the Government ought to make compensation for the injury inflicted and cannot invoke any municipal law to justify their refusal to do so." (*id.*, at 1095)

There is a close parallel between the *Shufeldt* case and the one involved here. Guatemala claimed that the contract was *ultra vires,* null and void, and vested no rights in the claimant because the power to approve or disapprove government contracts was assigned to the Legislature by the Constitution. While the Arbitrator found that the contract had been laid before the legislature in a Memorial of the Minister of Agriculture and not disapproved, the Government of Guatemala insisted that the Memorial contained no mention of the contract and that it had never been approved as required by the Constitution. Six years after Shufeldt claimed to have acquired his rights, the Assembly disapproved the contract and the Government argued that this established nullity *ab initio.* It also took the position that any claim of breach should be decided by arbitration in Guatemala and under no circumstances referred to the courts or to diplomatic channels. The subsequent arbitra-

tion before the Chief Justice of Honduras was established by agreement between the two governments concerned.

In the case before Swiss arbitrator Judge Cavin in *Sapphire International Petroleum Lted.* v. *National Iranian Oil Company,* 35 Int'l. Law Rep'ts. 136 (1967), as in the Revere case, the contract did not provide for the applicable law, but only that the parties undertook to carry out its provisions "in accordance with the principles of good faith and good will". In the present case the Jamaican Government's statements relating to the tax arrangements with the aluminum companies were that they were "to be regarded as binding in good faith on the Government".

The Arbitrator in *Sapphire* concluded that the contract before him had "a quasi-international character" and was not subject to the law of any country or any particular legal system. In his view "general principles of law based upon the practice common to civilised countries" were applicable. Having found that the National Iranian Oil Company in this case had "deliberately refused to carry out certain of its obligations" and that this failure was a breach of contract, he said

> ". . . It is a fundamental principle of law, which is constantly being proclaimed by international courts, that contractual undertakings must be respected. The rule *pacta sunt servanda* is the basis of every contractual relationship." (35 Int'l. Law Rep'ts., at 181)

In the *TOPCO/Libya Award,* Professor Dupuy also dealt with the relationship between nationalization measures under municipal law and State obligations under contracts subject to international law. With reference to the latter, he says:

> ". . . the State has placed itself within the international legal order in order to guarantee vis-a-vis its foreign contracting party a certain legal and economic status over a certain period of time. In consideration for this commitment, the partner is under an obligation to make a certain amount of investments in the country concerned and to explore and exploit at its own risks the petroleum resources which have been conceded to it.
>
> "Thus, the decision of a State to take nationalizing measures constitutes the exercise of an internal legal jurisdiction but carries international consequences when such measures affect international legal relationships in which the nationalizing State is involved" (*TOPCO/Libya Award,* at 50).

Further, after quoting from U. N. Resolution 1803 (XVII), he says:

> "The result is that a State cannot invoke its sovereignty to disregard commitments freely undertaken through the exercise of this same sovereignty and cannot, through measures belonging to its internal order, make null and void the rights of the contracting party which has performed its various obligations under the contract." (*id.,* at 54)

The position was clearly stated in the Third Report on State Responsibility submitted by the International Law Commission to the General Assembly of the United Nations in 1973, as follows:

> ". . . the fact that some particular conduct conforms to the provisions of national law or is even expressly

prescribed by those provisions does not make it possible to deny its internationally wrongful character when it constitutes a breach of an obligation established by international law. As has been clearly stated,

> 'The principle that a State cannot plead the provisions (or deficiencies) of its constitution, as a ground for the non-observance of its international obligations . . . is indeed one of the great principles of international law, informing the whole system and applying to every branch of it'. . . ." (II Yr. Bk. Int'l L. Comm. 1971, at 193, 277; See also 1973 Report to the General Assembly, A/9010/Rev. 1, II Yr. Bk. 1973, at 163, 188)

The situation in Jamaica with respect to the aluminum companies in 1957, 1966 and 1967, was the almost classic one of a government seeking to obtain substantial long term commitments from foreign investors for the economic development of its natural resources and for that purpose providing substantial inducements in the way of tax and other assurances for limited periods of time. If the sovereign power of a State cannot be fettered in this manner by entering into binding contracts, the State would be deprived of the power by such contracts to meet essential needs. Inevitably, in order to meet the aspirations of its people, the Government may for certain periods of time impose limits on the sovereign powers of the State, just as it does when it embarks on international financing by issuing long term government bonds on foreign markets. Under international law the commitments made in favor of foreign nationals are binding notwithstanding the power of Parliament and other governmental organs under the domestic Constitution to override or nullify such commitments. Any other position would mean in this case that Jamaica could

not in the exercise of its sovereign powers obtain foreign private capital to develop its resources or attract foreign industries. To suggest that for the purposes of obtaining foreign private capital the Government could only issue contracts that were non-binding would be meaningless. As the contracts were made in the sense that the commitments were set out in unqualified legal form, international law will give effect to them. For the purposes of this proceeding they must be regarded as binding.

Parenthetically, we repeat what we pointed out earlier as to the stated policy of the Foreign Assistance Act of 1961 that authorizes AID-OPIC insurance contracts, namely to support the principles of increased economic cooperation and trade among countries. Our view as to the meaning of the insurance contracts fosters such policy.

On this phase of the case we have concluded that, so far as international law is concerned, the Government of Jamaica was bound by its commitments under the provisions of the 1967 Agreement, including its commitments under Clause 12.

(c) *Did the Acts of June 1974 Constitute Breaches of the Agreement?*

In view of the above, little more need be said on this subject.

The magnitude of the Bauxite Levy was admittedly substantial. For the two years, 1974 and 1975, Revere paid $9,494,000. By OPIC's analysis this was equivalent to a gross production tax, for 1974, at the rate of about 20%, which would have been about 34% if Revere had not received a substantial subvention in exchange for incurring the expense of a feasibility study as to a proposed expansion of the plant. For 1975, OPIC estimates the rate at

35.9% on the actual production and at a hypothetical rate of about 30% if the plant had not shut down in August and had produced in 1975 the tonnage that was produced in 1974.

The effect of the Levy on the aluminum companies in general and on Revere in particular is clouded by the extent to which it may have been passed through to consumers by price increases. There was no legal impediment against a pass through except to the extent that price controls in the United States may have prevented it during the brief period when controls were in effect. All costs, particularly oil and labor, were rising rapidly and so were prices after controls were removed. In our view of the case we are not obliged to make any precise findings on this subject and we could not do so with confidence in any event on the record before us as to the period when Revere was in operation. In any event, we agree with OPIC that the Levy was not confiscatory and that it did not prevent RJA "from exercising effective control over the use or disposition of a substantial portion of its property". In our view, however, the important question is whether the Levy constituted a breach of the 1967 Agreement.

The Supreme Court of Jamaica in the action brought there by RJA held that under Jamaican law the 1967 Agreement "did not create any rights in RJA as against future taxes and that, therefore, the enactment of the bauxite production levy was not a breach of RJA's 1967 Agreement". We emphatically do not suggest that Chief Justice Smith did not properly state and apply Jamaican law or that RJA was not accorded full "due process" in the Jamaican court.

Chief Justice Smith did not address himself to the question whether the Government was bound in international law to observe the good faith commitments made by it in

contracts with foreign nationals. When he ruled that the provisions of Clause 12 were "void *ab initio*" because Ministers could not fetter the sovereign power of Parliament to legislate with respect to taxation, he applied principles of domestic law and not principles of international law.

If the parties had intended to preserve the Government's legislative freedom without the consequences under international law of violating its commitments, they could have done so in the Agreements entered into with the aluminum companies in 1957, 1966 and 1967. They did not do so. The 1957 commitments were allowed to stand unaltered for seventeen years, to be renewed and amplified in 1966 and 1967, and the latter to remain in effect for eight and seven years respectively.

In 1974 to 1976 the Government again negotiated contracts with the aluminum companies and again undertook commitments with respect to taxation as well as other important aspects of the relationships. In every case the agreements provide for the international arbitration of disputes arising out of certain fundamental provisions. Arbitration is to take place in Bermuda and arbitrators are to be appointed, where a party fails to make an appointment, by the President of the Law Society of London, England.

We think the reality is that, at least in the case of Revere in 1967, the parties, each for their respective reasons, did not come to grips with the fundamental problem that was resolved in the 1974-1976 negotiations. They left it for some future resolution if the event should transpire. Now the event has transpired and we must decide it.

Admittedly Parliament could at any time legislate with respect to taxes and thus override contracts with private

parties. It could not, however, deprive such parties of compensation, if the circumstances justified the payment of compensation under international law principles. In our view, such circumstances existed in this case.

We find that the commitments made by the Government were internationally binding, although they may not, as in the *Shufeldt* case, have prevented the legislature, acting under its Constitutional powers, from enacting legislation contrary to their provisions. Action contrary to them, however, constituted a breach.

(d) *Did the Government Repudiate Its Obligations Under the Agreement?*

Revere argues that the Prime Minister's declarations and other acts by the Government constituted a repudiation of the Agreement as a whole. To the contrary, OPIC says there were many instances where the continued existence of the Agreement was recognized. These included the Heads of Agreement of December 20, 1974, which provided for an amendment of the "existing Agreement" and various statements in the course of negotiations. RJA, they also say, still has all the rights needed for mining bauxite and producing alumina.

In Section 274 of Tentative Draft No. 9 of the American Law Institute Restatement of the Law Second—Contracts (1974), headed "When a Statement or an Act is a Repudiation", the term "repudiation" is said to be:

> "(a) a statement by the obligor to the obligee indicating that he will commit a breach that would of itself give the obligee a claim for damages for total breach under §268, or

> "(b) a voluntary affirmative act which renders him unable or apparently unable to perform without a breach."

In the comment to (b), it is said that the language "must be sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform". It is also said:

> "Language that is accompanied by a breach by nonperformance may amount to a repudiation even though standing alone, it would not be sufficiently positive." (TD No. 9, at 4)

The law of England and the United States is largely similar on this point (4 CORBIN on Contracts §959, etc.)

Numerous official statements during the first half of 1974 made clear the Government's intentions and determination to replace the existing contracts with new arrangements. These, coupled with the legislative Acts of June 1974, appear to us to meet the requirements of repudiation.

Thus, on January 3, 1974, the Prime Minister publicly announced that "the Government of Jamaica cannot be bound" by its agreements with the aluminum companies "any longer". On March 15, 1974 negotiating proposals were submitted, some of which were stated as negotiating proposals, but many were put in terms of contract changes that had been or were being made. For example, the revenue proposals stated:

> ". . . special arrangements relating to income tax rates under previous Agreements *will cease*"; "A production levy *will be introduced* effective and payable 1st January 1974"; "The present royalty rates *will be replaced* . . . effective and payable from 1st January

1974"; depletion allowances "*will discontinue* effective 1st January 1974"; . . . the Government *will not grant* any exemption from the payment of withholding taxes"; "The production levy and the royalties *will be subject to review* at the end of two years . . . and thereafter every two years"; OPIC premia "*will not be allowed* as a deductible expense"; Government *reserves the right to grant* to other Companies terms and conditions different from those granted to your Company"; . . . all of the foreign exchange proceeds . . . *must be sold* to an authorized depositary; . . . All overseas payments *must be made* from a Jamaican Bank account and *must be subject* to the approval of the Bank of Jamaica in accordance with the Exchange Control Law"; exports of bauxite and alumina *will be regulated* (emphasis added).

It was also stated to be the Government's policy "to secure maximum national ownership of and effective national control over the bauxite and alumina enterprises operating in Jamaica" and "to purchase all of the surface rights held by your Company"; "Government has decided to revoke all existing mining leases and licenses"; "Government wishes to negotiate majority local equity participation in your Company". The option given to the Company to enjoy terms granted to other companies was to be ended.

Proposals by the companies to increase revenues to the Government to meet its financial requirements were rejected. In his Statement to the House of Representatives of May 15, 1974, proposing the Bauxite Levy, the Prime Minister dismissed these proposals as simply an attempt "to estimate the government's need of revenue". Govern-

ment demands, he said, were "based upon the value of the resources of Jamaica's own and not simply on budgetary needs". It was estimated that the yield for the 15 months ending May 31, 1975 would be approximately $189 million (U. S. dollars) and the royalty "gross take" would be $7 million (Jamaican dollars). The additional revenue, he proposed, would be placed in "a capital development fund that will be used for building up and rationalizing the productive capacity of the economy".*

As stated above, a May 15, 1974 Government Press Release stated:

> "The renegotiation of contracts with aluminum companies is not only a necessity and the right of a sovereign nation, but an obligation to the people. These considerations outweigh the sanctity of contractual arrangements."

It is clear from these statements and from the action taken by Parliament on June 8 and 17 and Ministerial actions thereafter, pursuant to these enactments, that the Government had decided to establish a new relationship with the aluminum companies and that it would not revert to the earlier agreements. It is impossible to conclude that the Government was prepared to continue on the 1967 terms. This is confirmed by a U. S. Embassy cable of May 21, 1974, in which it was said:

> "It is now obvious that the govt meant pretty much what it said in its Mar. 15 list of demands . . . and that its notion of negotiations is a joint determination over how its objectives are to be achieved, and

* According to the testimony, no such capital development fund was ever created.

not an exchange of concessions leading to a general compromise. . . ."

The legislative Acts of June 1974, the earlier and related statements of the Prime Minister, the elected Chief of State, the peremptory nature of the negotiating proposals of March 15, and actions subsequent to the June 1974 legislation in total evidenced repudiation by the Government by June 30, 1974, of its obligations under the Agreement with RJA.

We are reinforced in the conclusion that this was the intention of the Government by two facets of the June legislation that bear directly on an important provision of the RJA Agreement: Paragraph 23 provides that RJA "will maintain permanent and substantial mining of bauxite subject to force majeure and due regard being paid to world conditions in the aluminum industry".

OPIC says it was sensible for Jamaica to design its tax system "to be based on tons of bauxite consumed rather than net income". But the system wasn't based on bauxite actually consumed. It was based as to each company on an amount "deemed" to be extracted as stated in schedules promulgated from time to time by the Minister, subject to approval of the legislature. If the amount actually extracted in any year was less than the amount "deemed" to have been extracted, the Levy was nonetheless specifically stated to be based on the "deemed" amount. The effect of this, of course, was that the less extracted the higher the rate; world conditions in the aluminum industry and force majeure had nothing to do with it. None of the tax cases cited by OPIC contains any such provision or at least we have not been told so.

The June legislation included an amendment of the Mining Act that empowered the Minister by order to require the extraction of such minimum quantities as he might prescribe, notwithstanding anything to the contrary in any agreement. Nothing was said about force majeure or due regard to world conditions in the mining industry. On July 29, 1974, the Minister issued an Order exercising that authority. The Order was revoked on September 19, 1974. No explanation has been given to us for this revocation. So far as we have been advised the Act remains in effect. In fact, the right of the Government to require minimum production under the Mining Act was recognized in the new Kaiser and Reynolds Agreements which committed the Government simply to "begin discussions" if the companies believe market conditions require a lowering of worldwide or regional production.

We are further reinforced in this conclusion by the fact that the Government refused to arbitrate these matters with Alcoa, Kaiser and Reynolds before the International Centre for the Settlement of Investment Disputes despite clauses in their contracts calling for such arbitration, and we think it appropriate to note that in new Agreements with those companies, each company agreed to terminate its arbitration proceeding and released the Government from all liability in connection with the prior episodes.

The repudiation of the RJA Agreement did not, of course, exclude the possibility that parts of the Agreement might be carried forward into a new arrangement providing for participation etc., as indicated in the Heads of December 20, 1974. Fundamentally, however, the relationship would be different, as evidenced by the new Agreements between the Government, on the one hand, and Alcoa, Kaiser and Reynolds, on the other.

In the case of RJA, what did this mean? As we see it, the status of RJA in Jamaica was no longer protected by a contract between it and the Government of Jamaica that guaranteed it against further obligations ("no obligation will be placed on the Company") or derogations "from its rights to own, operate, possess, use, and realize the lands, plant, equipment and other property held in connection with the project. . .". It is argued that RJA still had this protection under the Constitution of Jamaica but Constitutional guarantees are frequently less effective than those provided by contract; anyway, the Constitution could be changed as the supremacy of Parliament is provided for in certain instances. If the law of Jamaica depended on what Parliament did and Parliament decided to interfere further with RJA's operations, RJA would not be protected.

RJA was also deprived of many other rights under its contract, which we need not again enumerate. Not the least among these were exemptions from exchange controls and the agreement by the Government that RJA would enjoy the same rights as those granted to other companies. The latter provision was surely of considerable significance in a highly competitive industry.

Revere could hardly state in a future prospectus under the Securities Act that its rights were protected by an agreement with the Government. It would, of course, have to spell out the action taken by the Government in 1974 and emphasize the resulting insecurity of its position. It could no longer merely maintain a brave front pretending either that the 1967 Agreement was still in full force and effect or that its rights were otherwise protected under Jamaican law.

We thus conclude that the Government did repudiate the 1967 Agreement.

(e) *Did Repudiation of the Agreement Constitute Expropriatory Action Under Section 1.15?*

This is not a claim against the Government of Jamaica for damages for breach or repudiation of the Agreement on the ground that such action constituted a violation of international law. The sole question for decision here is whether the Government actions repudiating the Agreement directly prevented RJA from exercising effective control over the use or disposition of a substantial portion of its property or from operating the property. The answer to this question requires an analysis of the Agreement and its relation to the use, operation and disposition of the plant and other facilities.

In the post-hearing Reply Memorandum, OPIC says that the action "of a foreign government resulting in the abrogation, impairment, repudiation or breach" of a "Concession" Agreement "will almost always satisfy the criteria of subsection 1.15(d) . . .". OPIC adds, however, that the RJA Agreement is not a concession agreement but a guaranty agreement not covered by 1.15(d).

Unquestionably the distinction is a useful analytical tool but we find it unpersuasive as applied to this case. In both cases it is the impact of the breach or repudiation on the matter of effective control that determines the issue.

If the repudiation by a Government of a Concession Agreement "will almost always satisfy the criteria of subsection 1.15(d)", we do not understand why this may not also be true of similar governmental action in relation to a long term economic development agreement that is the basis for large investments in manufacturing and related facilities as well as in mining and that includes provisions for legal and economic stability that are as vital to the

enterprise as the concession itself. These include such significant aspects as the import of essential personnel and materials, duty to mine only subject to world aluminum conditions, taxation, exchange controls, and import duties.

Although the RJA Agreement did not by itself grant rights to mine, it did contain important commitments by the Government to provide adequate reserves of "commercial bauxite". These were implemented by the Special Mining Lease, but the March 15 demands stated: "*Government has decided to revoke* all existing mining leases" (emphasis added). Although specific revocation of the mining lease has not taken place, the Agreement that gave content and economic meaning to the right to operate under it has been repudiated. New leases issued to other companies are part of the new partnership relationship as to them.

In our view the effects of the Jamaican Government's actions in repudiating its long term commitments to RJA have substantially the same impact on effective control over use and operation as if the properties were themselves conceded by a concession contract that was repudiated. In reaching this conclusion we are mindful that Government action impact must be on the *exercise* of control, and that the control referred to must be "effective": that is, it must be practical and not merely theoretical control. This is not a legalistic but a practical problem. OPIC argues that RJA still has all the rights and property that it had before the events of 1974: it is in possession of the plant and other facilities; it has its Mining Lease; it can operate as it did before. This may be true in a formal sense but for the reasons stated below we do not regard RJA's "control" of the use and operation of its properties as any longer "effective" in view of the destruction by Government actions of its contract rights.

Control in a large industrial enterprise, such as that conducted by RJA in Jamaica, is exercised by a continuous stream of decisions. It is this decision making process that must be examined before deciding whether effective control exists and can be exercised in the absence of a stabilization agreement with the Government.

We heard testimony about the possible need for new and perhaps different boilers and also about problems at the mud flats, both of which called for some action, some decision. We mention these matters simply as examples of the continuous need for decisions in any large enterprise. In analyzing the control of the RJA enterprise the focus should be on decision making and on what happens to it when the contract disappears on which the entire structure was built, for we have no doubt that this structure was built on the contract and would not have been built without it.

Without putting too fine a point on it, such factors as present cost, probable life of the facility, financing, probable impact on total operation, anticipated return, all leading to a cost-benefit analysis, are some of the factors at the heart of day-to-day decision making in small matters as well as in large ones. Rational decisions require some continuity of the enterprise. In a large enterprise like the present one, with the contract gone decisions simply become gambles. Risks are inherent in all such decision making, but without the contract the odds cannot be calculated. There is no way in which rational decisions can be made. What the Government did yesterday it can do tomorrow or next week or next month. If it did one thing yesterday, it can do something else tomorrow or next week or next month. This is the antithesis of the rational decision making that lies at the heart of control. Here "effective con-

trol" not only of the contract but of the entire operation has been lost, due directly to the action of the Government. Webster defines "directly" as "in a direct way; without anything intervening". Nothing intervened here between the Government Actions and the loss of effective control.

Some may embark on enterprises in host countries without an overall contract. Indeed for a variety of reasons this probably happens more frequently than not in lesser enterprises. To do so would be highly unusual in any enterprise as extensive and complex as this bauxite-alumina operation. Be that as it may, the fact that some may be happy to gamble does not shed light on the problem at the heart of this case.

There was much testimony of a possible expansion, even a tripling of capacity, and of a proposed joint venture with a Japanese consortium that would participate in the expansion. Nothing came of it. We give little weight to the aborting of those plans. They were so far reaching and of such complexity that their failure cannot be ascribed directly to the loss of control resulting from the elimination of the contract.

If this analysis is not valid, if physical impact on a substantial portion or all of the property or on the operation of the enterprise is needed to trigger subsection 1.15(d), one must ask at what point, if ever, in a complex industrial operation such as we have here, involving large investments, will the cumulative impact of the inability to make rational decisions in fact trigger this subsection?

Must one wait until there has occurred something akin to the trocps coming in, little by little or all at once, in a nineteenth century sense? Must there be some physical impact? In our view such narrow interpretation of the

contract of insurance does not fit the realities of today and was not intended by the framers of subsection 1.15.

OPIC's position on this point, as we understand it, is that the existence or non-existence of an underlying contract is irrelevant to the insurance coverage. OPIC points to its published Handbook and to four policy statements as pointing out to investors its view to that effect. Our reading of those documents does not support that conclusion. We think the thrust of the documents is simply to warn that the insured investor should not assume that every breach of contract by a host government will per se trigger an insurance payment.

The final sentence of Section 1.15 provides:

> "The abrogation, impairment, repudiation or breach by the Government of the Project Country of any undertaking, agreement or contract relating to the Project shall be considered an Expropriatory Action only if it constitutes Expropriatory Action in accordance with the criteria set forth in this section."

The operative words of that sentence are abrogation, impairment, repudiation and breach. Of those words only one, breach, appears in any of the explanatory documents and that word appears frequently, followed in one case by a reference to failure to pay for goods or services (Handbook, page 19) and in another case by a reference to particular provisions of the agreement (Policy 6.4, July 15, 1968).

Two other documents, Revisions 2 and 3 of Policy 3.8, seem to say both that the insurance contract should state explicitly that the concession contract is not included in the coverage (the Revere insurance contract was silent) and that "the guaranty should be very clear that breaches" are

not expropriation per se but are to be measured by the standard definition. The fifth document, mentioning only breach, simply paraphrases Policy 3.8.

If the framers of those explanatory documents had intended to point out an absence of coverage of a total abrogation or repudiation of a contract of the sort Revere had with the GOJ, we believe they would have said it. In short, we think the documents are not inconsistent with our view of Section 1.15 and in fact, in part by inference and in part by silence, reinforce it.

Our review of the record does not show whether the form of insurance contract used by OPIC in 1975 was the same as the OPIC Contract with Revere in 1970, but, if it was, OPIC's revised 1975 Handbook further reinforces our view of Section 1.15. That Handbook says:

> "OPIC insurance contracts define the insurable event of 'expropriatory action' to include not only classic nationalization of an enterprise or the taking of property, but also a variety of situations which might be described as 'creeping expropriation'. An action 'taken, authorized, ratified or condoned' by the project country government is considered to be expropriatory if it has a specified impact on either the properties or operations of the foreign enterprise, or on the rights or financial interests of the insured investor."

This analysis of the insurance contract should not be understood to lead inevitably to coverage in every case of repudiation of an agreement by a host country. Many cases can be postulated, particularly in the commercial field, in which that result would not follow. Indeed, OPIC in its Handbook, mentioning breach and pointing primarily to

the commercial field, suggests some of the areas in which coverage is absent.

Much evidence was presented to the Panel on the financial aspects of the RJA operation. In our view that evidence, relevant to fixing the amount due Revere in the event of a finding for Revere on the merits, is not pertinent to the basic questions to be resolved as to the merits. The evidence did not establish that the Revere property was totally worthless nor did OPIC contend that it was.

A few words about the Minority Opinion:

Evidently we have failed to make clear our analysis of this case. We do not contend that the Contract between Revere and OPIC is governed by international law—it is obviously governed by th law of the District of Columbia. As we endeavor to make clear at considerable length, principles of international law are relevant in determining whether the Agreement between RJA and the Government of Jamaica, which is silent as to the applicable law, was governed solely by the law of Jamaica and, therefore, whether the decision of the Supreme Court of Jamaica on the question of breach was decisive as to this arbitration. In our view such principles were applicable to the Agreement; accordingly, the actions of the Government, whatever their validity under Jamaican law, effectively abrogated it. This is of two-fold importance: first, the flat exemption from OPIC liability in paragraph (1) of Section 1.15 is inapplicable; second, and of even more importance, the abrogation in violation of international law brings us to a determination of whether that action is Expropriatory Action within the meaning of (a) to (e) of Section 1.15.

On the latter point, we simply differ with the minority as to what as a practical matter constitutes effective control

of operations of a $100,000,000 industrial complex. One example will point up the fundamental difference between us. Freedom to make rational management decisions is at the heart of effective control. Suppose management urgently seeks the services of an extremely competent technically qualified person to be in charge of a complex enterprise such as we have in this case, but that person insists on a long term highly remunerative contract of the sort that is not unusual today. Does management commit itself to the long term expenditure in the face of a Mining Act that in direct violation of an agreement empowers a Minister at any time by order to require the extraction of such minimum quantities as he may prescribe, without regard to force majeure or world conditions in the mining industry as required by the agreement, to mention only one of the actions taken by the Government? There has not yet been any physical impact on operations because no such order is in effect at the time. On what basis does management decide whether to hire such a person on such terms? We don't know. We think effective control is gone. We cannot equate the views urged on us today by OPIC with those of the framers of the OPIC Contract and the draftsmen of OPIC's contemporaneous descriptive material.

With respect to the shut down on August 15, 1975, the panel received at least forty exhibits exhaustively detailing the extensive negotiations and communications relating to it. The minority opinion reviews at some length a number of those exhibits. Virtually all of the exhibits are more than a year after June 30, 1974 when we have found that Expropriatory Action was concluded. OPIC had contended that if there were Expropriatory Action at all, it had occurred as of August 31, 1975, the end of the month of the shut down. In the light of our conclusion that fixes the

date at June 30, 1974, we find those events and communications only of passing interest.

Revere and the Jamaican Government were engaged in intense negotiations not only about the shutdown, but also about the possible acquisition of the property by the Government and, hopefully, the expansion of the property with the participation of a Japanese consortium. Those matters were highly complex, were all being considered contemporaneously and at least as early as June 12, 1975, and caused protracted negotiations over a period of many months. We think that the way in which the parties presented their proposals, including proposals about the shutdown, and reacted to counterproposals, always seeking a compromise in hard bargaining, sheds doubtful light on the events of the first six months of 1974.

Perhaps we should add that the only relief from the Bauxite Levy offered by the Jamaican Government that we find in the record if the plant were not shut down applied to the balance of the year 1975 and not to later years.

Since in our view the action of the Government come within subsection 1.15(d) of the OPIC contract, the last sentence of Section 1.15 is inapplicable. And since the actions violate generally accepted international law principles, paragraph (1) is inapplicable. On the issue of liability, therefore, we find on the merits for Revere and award accordingly.

Part Two

Compensation Issues

The provisions of the OPIC Contract relevant to the issues of compensation are set out in the Appendix to this Award. A majority having determined in Part One that

Expropriatory Actions, as defined in Section 1.15(d), was take by the Government of Jamaica, it is now necessary to determine, in accordance with Section 18, what loss, if any, resulted from such Action. As provided in Section 18.01, such loss "shall be the Net Investment as of the Date of Expropriation".

These issues were the subject of hearings on January 6, February 22, March 28, May 9 to 11 (when four witnesses were examined) and May 22, 1978. Additional documents and extensive briefs by both parties were submitted.

There are two preliminary questions to be considered: the Date of Expropriation and the relevance of Section 482 of the Internal Revenue Code and the Regulations thereunder, referred to in Section 2.09. We shall first deal with these questions and then with the amount of Revere's Net Investment.

(1) *Date of Expropriation*

Having decided that the Expropriatory Action in this case was the abrogation by the Government of Jamaica of the Agreement between it and RJA, we fix the Date of Expropriation at June 30, 1974. That term is defined in Section 1.12 as "the first day of the period in which an action through its duration became Expropriatory Action . . ."

It is argued by Revere that "the first day" is January 3, 1974, when Prime Minister Manley made his declaration that the bauxite "contracts have been abrogated by history" and that "the Government of Jamaica cannot be bound by them any longer."

This, in our view, was a statement of intention and Government policy to be implemented, if possible, by a renegotiation of the various contracts. It was only when such renegotiation failed and the Government took posi-

tive and affirmative action in breach of the contracts that a majority of us consider Expropriatory Action to have been taken. In the view of such majority, the enactments of June 1974 were the culminating events which evidenced the Government's repudiation of the Agreement of March 10, 1967, and put an end to it. This completed the Expropriatory Action which directly resulted in preventing RJA from exercising effective control over the use or disposition of its property. Such Action has never been terminated notwithstanding the efforts made during the balance of 1974 and during 1975 to negotiate new terms under which RJA could exercise effective control. A majority have thus concluded that the Expropriatory Action was completed in June 1974; for convenience we set the "Date of Expropriation" at June 30, 1974. This was during the Guaranty period and continued for more than a year, thus meeting the requirements of Section 1.15.

(2) *Section 482 of the I.R.C.*

There is no argument regarding the applicability of "generally accepted accounting principles", which will hereafter be referred to as "GAAP". Revere contends, however, that the reference to Section 482 in Section 2.09 of the Contract is "essentially meaningless". It does not prescribe "standards of accounting"; rather it provides statutory authority and regulatory guidance for the Secretary of the Treasury in distributing items among entities under common control in order to prevent evasion of taxes or clearly to reflect the income of any such entities. Its irrelevance, Revere says, is indicated by the fact that reference to it did not appear in the AID contract form until July 1968 and that the decision was taken in August 1970 not to refer to it in the new contract form issued in December 1970. If the

OPIC Contract with Revere had been concluded in December 1970, rather than in September of that year, there would have been no such reference. Its irrelevance is underscored, says Revere, by a statement in an internal AID memorandum, relating to the new August 1970 draft, that Section 2.09 (omitting the reference to 482) had "not been substantially changed . . ."

We cannot speculate helpfully on what the author of the memorandum had in mind; perhaps he believed that the requirement of Section 18.03 as to generally accepted accounting principles mandated a similar result. Perhaps so; we do not reach that question.

Notwithstanding the force of these contentions, we have concluded that the reference in Section 2.09 to "the standards of accounting required by Section 482 and the regulations thereunder" does require, for the purposes of the OPIC Contract, the application of an arm's length standard in the accounts of corporations under common control. That standard is defined in the Regulations as follows:

> "The standard to be applied in every case is that of an uncontrolled taxpayer dealing at arm's length with another uncontrolled taxpayer." (Reg. 1.482 (b)(1))

Accordingly, we accept OPIC's contention that, for the purpose of determining compensation to Revere under the Contract, the arm's length standard must be applied to the RJA accounts. This is particularly important in view of the requirement of Section 18.01 that the Revere loss shall be its Net Investment, defined in Section 1.28 to be the amount contributed by Revere, adjusted for retained earnings and losses of RJA accruing after the date of acquisition of RJA Securities by Revere. It seems to us

essential to determine such adjustments on the basis of the arm's length standard and not on the basis merely of consolidated accounts prepared in accordance with GAAP, particularly as OPIC under Section 16.02 will acquire the RJA shares of stock held by Revere and will thus take over RJA as a separate entity and not as part of a consolidated Revere group.

(3) *Adjustments Called for by OPIC*

OPIC contends that the adjustments required to meet the arm's length standard of Section 482 are the following:

(a) the writing down of RJA assets in accordance with the concept of recoverability;

(b) the charging of interest on loans made by Revere (at June 30, 1974, these totalled $30,255,000);

(c) the allocation to RJA of a proper share of corporate administrative overhead;

(d) the adjustment of transfer prices for sales to Revere;

(e) the elimination of income tax credits allocated by Revere to RJA;

(f) the increase of depreciation charges;

(g) the write-off of non-usable equipment;

(h) the write-off of development and exploration costs; and

(i) the reduction of depletion charges.

Although we shall deal with all of these contentions, we shall address first the matter of a write-down (item

(a)); for if a write-down should be appropriate, then some other items, such as depreciation and the question of non-usable equipment, would be taken care of.

(a) *Write-down of the RJA Plant*

When asked for their opinion regarding the treatment under GAAP of an uncertainty as to the recoverability of balance sheet values in the RJA financial statements for 1973 and 1974, Arthur Young and Company, the accounting firm retained by OPIC to advise it on the accounting issues involved in this case, replied that, if presented on the basis of a company without the financial support of its parent, these statements should have disclosed the uncertainty of asset realization or reflected a write-down for the potential nonrealization of those assets, if such write-down was reasonably estimable, or both. If there were no write-down, the auditor's opinion should have included an exception as to the effects of the uncertainty concerning asset realization.

Paul Kramer, the Arthur Young partner in charge of the team advising OPIC, testified that the concept of recoverability in generally accepted accounting principles is a fundamental concept and essentially relates to the conversion into cash of an investment in inventories or fixed plan through the earning process of the enterprise or, in the case of inventories, through their sale. Recoverability becomes a matter of concern in the case of a plant investment "when there are continuing losses in connection with that plant and there is significant uncertainty as to whether the fixed plant will recover its investment . . ."

When the question does arise, management has the responsibility for dealing with the situation. If there is significant uncertainty as to recoverability and management is publishing the financial statements, it should determine whether it can estimate a write-down of the plant "to a lower amount that would be recoverable through ordinary operations". It has the obligation to disclose the uncertainty concerning recoverability in its financial statements through footnotes or through a write-down, or both. In Kramer's opinion a write-down in this particular situation was an appropriate course of action if analysis indicated that an estimate could be made "through a forecasting process" that the stated values were recoverable.

Where a write-down is made, the auditor's responsibility is to determine that it has been "reasonably estimated and that it is supported by sufficient facts and analysis". If the company was an uncontrolled entity and this question of recoverability confronted the auditors, they would have been required to qualify their opinion with respect to that uncertainty; but if there was a write-down "based on a reasonable estimation process" and the amount written down was "at a level . . . that removed the uncertainty as to recoverability", then the auditors could give a clean opinion.

Revere offered no testimony in opposition to the accounting opinion outlined above.

The question before us is not whether auditors would have had to qualify their opinion if the financial statements were certified on the basis of the arm's length standard of Section 482. The question is whether, having regard to that standard, the uncertainties prevailing at June 30, 1974 regarding recoverability of the asset values shown on the balance sheet of that date were such that the values should be written down to a level where a reasonable estimate of future earning might indicate their recoverability

over the estimated life of the plant. Unless such a write-down were made, OPIC would as noted above, be required to pay an amount in excess of the reasonable value of what Revere claims to have lost as the result of Expropriatory Action.

If the uncertainties were such that some note of them should have been taken in the RJA statements, i.e., a write-down or a disclosure or both, the pertinent RJA statements, which gave no recognition to the uncertainties, failed to comply with generally accepted accounting principles falling within the standards required by Section 2.09 of the OPIC contract.

In Kramer's opinion there was "significant uncertainty regarding the recoverability of the assets" of RJA after it commenced operations. We concur in that view.

Cost overruns during construction seem to have been large and the operation was plagued with serious difficulties from the beginning, largely stemming from the nature of the bauxite available on the properties leased by RJA. The processing of this ore required intensive heat and pressure, which led to excessive fuel bills and serious strains on boilers and other equipment. We think it unnecessary here to make a detailed analysis of the voluminous technical engineering testimony presented to the panel.

Revere characterizes the difficulties simply as start up problems, but we think they were much more fundamental than that. For the purposes of this arbitration we think it enough to refer to RJA's monthly production costs per ton from January 1, 1973 to the close of operations in August 1975. In 1973, costs varied from a low of $77.36 in June to a high of $194.02 in December, for an average annual cost of $102.12. In 1974, excluding June, as to which the only

figure in evidence includes the bauxite levy, the low was $128.12 in May and the high was $203.81 in September, for an average of $157.10 for the eleven months excluding June. In the first four months of 1974, the cost varied from a low of $128.12 to a high of $181.95, for an average of $149.46. In the first seven months of 1975, prior to the shutdown, the low was $180.19 and the high $300.89, for an average of $214.67.

During this period the transfer prices per ton charged Revere by RJA were: $64.50 at January 1, 1973; raised to $68 as of October 1, 1973, to $100 as of June 1, 1974, and to $125 as of January 1, 1975. While the prices were controlled by Revere, the parent, and were undoubtedly low by industry comparisons, at least prior to January 1, 1975, we are satisfied that it would have been totally unrealistic to have thought that RJA, on a separate company basis, did not have a serious question as to recoverability. Its operating results were becoming more critical, not less, down to the moment of shutdown in August 1975.

As early as the spring of 1972, the question of recoverability was raised by RJA's auditors in connection with the 1971 financial statements. In subsequent years a different firm handled the account and its working papers show that the question continued to be raised almost if not actually on an annual basis. Nothing was done about it; perhaps properly so, because the consolidated group of which RJA was a part was viable and Revere, the parent, was willing to absorb RJA's losses. Revere had written a letter to that effect in the spring of 1972 when the matter first came up during discussions prior to the issuance of the audited 1971 financial statements. But that does not answer the question in this arbitration as to whether the financial statements, more particularly the statement as

of June 30, 1974, the date of Expropriatory Action, were prepared on the basis of the arms length standard of Section 482.

Given the uncertainty of recoverability, GAAP would require as pointed out above, either a write-down or a disclosure or both. Revere, of course, would opt for disclosure, but that fails to assist in a calculation of Net Investment under the OPIC contract, which must necessarily be a fixed figure. We see a write-down as the only alternative.

What RJA plant values at June 30, 1974 would have been recoverable over a period of 23 years through earnings which could then have been reasonably estimated? We have not been furnished with any estimates of earnings except for expanded plants capable of producing 300,000 or 820,000 short tons of alumina annually. Without the investment of additional funds to expand production, there appears to have been no prospect of recoverability. The worksheets of Coopers & Lybrand, the Revere and RJA auditors, for mid-1973 indicated that a write-down of $56,760,000 would be required for the plant to break even, based on August 1973 costs, output and sales price. That was an exceptional month, however, and Paul Kramer did not think that a "reasonable estimation of write-down should be based solely on the best results achieved" if subsequent costs were significantly higher, as they were.

Nor should it be based on the then prevailing transfer price of $64.30. As was stated for Revere in the oral argument, the Coopers' calculation concluded that a reduction of depreciation costs by $10 per ton of alumina would be necessary for the plant to break even, but this could readily have been achieved by raising the price paid by Revere for alumina, as was in fact done the following year, instead of writing the plant down by $56 million.

Richard Roberts, OPIC's engineer expert, testified that an arm's length price for alumina in 1975 was $110 per ton. While he did not know the free market prices in early 1974, he testified that "they were in that general area" of $100 to $110 per ton. Revere's price in June 1974 was $100 per ton.

Roberts, however, found RJA's costs out of line with those of other Jamaica alumina companies. He addressed himself to estimated costs of $92.43 for an expanded plant of $700,000 short tons per year and $89.24 for one of 821,000 tons. The latter, he said, would be "quite marginal", particularly as the $89 figure did not include transportation costs to deep water of $9 per ton, making $98 per ton compared with per ton costs of other plants of $70 to $80. With interest and depreciation added, RJA's costs would run $130 to $135 per ton, compared with a sales price for alumina of $100 to $110 per ton.

Roberts did not consider that RJA could have obtained more than $20,000,000 for the plant, adding "I would think somewhere in the range of $15 to $20 million".

At June 30, 1974, the balance sheet item "Machinery, equipment and other productive facilities" apparently showed a net figure after depreciation and depletion, of $73.3 million. This is arrived at by taking half the difference between this item at 12/31/73 and the corresponding item at 12/31/74. If the $56 million write-down were applied, the balance would be $17.3 million, as compared with the $15 to $20 million estimate made by Richard Roberts. The result would reduce "stockholders' investment" to $7.37 million.

An alternative approach to this question of write-down would be to consider the value of the plant as a basis for expansion. It was on this basis that RJA negotiated with

the Government of Jamaica and with the Japanese Consortium. While nothing came of these negotiations, it is worth noting that Matalon indicated a figure of $15 to $20 million as a price which his Government might be willing to pay. More significantly, Moberly, OPIC's own expert, calculated values on the basis of expansions to 300,000 and 820,000 short tons.

While Moberly's calculations seem to us to have been based on theoretical assumptions of a highly speculative nature, it is perhaps worthwhile to mention them. He made two projections with respect to a plant having an annual output of 300,000 short tons; one on the basis of 485° F. digestion, the other on the basis of 470° F. digestion and use of a synthetic flocculant. The former involved an expansion estimated to cost $17 million, the latter a $10 million estimated cost. The former indicated a present day value of $18.37 million for the expanded plant using 485° F. digestion and involving an additional expenditure of $17 million. The latter indicated a present day value of $55.6 million involving use of a synthetic flocculant and the expenditure of $10 million.

Richard Roberts was skeptical about the viability of a plant limited to an expansion of 80,000 short tons. It "would not have been economic", he said. It also appeared that the capital and operating costs would be considerably higher than Revere had estimated. Even expansion to 800,000 short tons would, in his opinion, have little attraction to a potential investor, as operating costs of $89 a ton were indicated, as compared with $70 to $80 a ton at other plants. Adding transportation costs of $9 per ton, interest and depreciation charges, costs per ton would be in the area of $130 to $135 compared with a market price for alumina of $100 to $110 per ton. Roberts mentioned

several negative factors that a potential buyer would take into account in deciding how much to pay for the plant. Operating experience had been poor. The location of the plant was a major problem. There was the problem of concealed damage. During his examination in 1978 he had found considerable evidence of deterioration. Damage to boilers was apparent, wear and tear had been abnormally high. There was evidence of contamination from soda compounds. While it was a new plant, it had had a lot of trouble: more so than other plants in the tropics. With the heavy maintenance problems the Revere personnel had experienced, a considerable amount of concealed damage was to be expected. To make the plant viable, it would be necessary to spend $250 million. To make the plant the nucleus of an expansion would require considerable revamping. To build a greenfield plant in a better location would be more attractive to a buyer than having to tear out piping and electrical installations, replacing equipment and coping with problems of transportation.

Roberts made a detailed analysis of the proposed expansion to 300,000 S.T. and the use of a synthetic flocculant. He concluded that such expansion would actually cost $20.6 million on a 1975 basis instead of the $10 million figure used by Moberly. He also estimated plant level manufacturing cost at $118.66 per S.T. Moreover, use of synthetic flocculants for goethitic muds had been tested only in the laboratory under static conditions and not under the dynamic flow conditions of the plant.

Revere offered no testimony to rebut any of Roberts' views.

Assuming, nevertheless, that the present day value of a yearly cash flow discounted at 10% would, as calculated by Moberly, amount to $55 million, a reduction of this value by an additional $25 million construction cost would in-

dicate a present day value on a discounted basis of 10% of around $30 million. Such a value, however, would be predicated on finding a buyer willing to finance the expansion. As OPIC could hardly be expected to pay compensation on this basis, the only utility of these calculations appears to us their possible use as a guide in assessing the Matalon and Roberts figures of $15 to $20 million for the plant as it was in 1974 or 1975.

Although recoverability of an amount of $30 million through the operations of an expanded plant seems to us doubtful, having regard to operating costs, location of the plant, etc., the testimonies of Matalon, Moberly and Roberts all indicate some value for the plant apart from scrap. It could perhaps be sold to someone willing to use it as a nucleus for further expansion or an efficient operator could perhaps produce alumina somewhere near the figures projected by Moberly.

Taking all factors into account we conclude that a reasonable figure for present purposes would be $27 million. This would mean a write down at June 30, 1974 of $48.3 million. This would be less than the figure calculated in the Coopers & Lybrand working papers, and less than what Roberts indicated would be required from an engineering standpoint or what would be required to meet Matalon's negotiating figure. The result seems to us a reasonable estimation of recoverability in the light of all the testimony and gives some effect, we believe, to the possibility that in time RJA might have solved some of the technical problems in processing goethitic ores at a competitive cost.

(b) *Interest on Loans From Revere to RJA*

Due to overruns on construction costs and to continuous losses, Revere was obliged to advance money to RJA in

amounts that ultimately aggregated many millions of dollars. No interest was charged by Revere on those advances and OPIC contends that it should be charged for the purpose of the Contract.

Business men often make loans without interest to each other and to ventures in which they and others are interested. Some reason for doing so, if only arms length bargaining, is invariably evident. Here there was no arms length bargaining and the only reason stated to us for not charging interest appears in a Revere interoffice memorandum referring to the difference in tax rates between U. S. and Jamaican corporate taxes. Revere's present Controller thought interest should be charged as did the manager of the Revere account at the outside auditing firm. Nevertheless, interest was not charged and each of the audited financial statements of RJA for the years 1971 through 1976 included the disclosure that "interest and expenses arising from financing the plant have been borne by the parent company (Revere)". That solution complied with a generally accepted accounting standard, as we understand it, but in our view did not comply with the standard required by Section 2.09 of the OPIC Contract.

A regulation issued under the authority of Section 482 (Reg. §1.482-2(a)) provides for imputing interest "to reflect an arm's length interest rate" where "one member of a group of controlled entities makes a loan or advance directly or indirectly to, or otherwise becomes a creditor of, another member of such group, and charges no interest . . ." The anomaly of Revere's position mentioned above is pointed up by Reg. §1.482-2(a)(3) which provides that the authority of the IRS to allocate interest "does not apply to alleged indebtedness which was in fact a contribution of capital . . ."

OPIC has submitted to the Panel a memorandum setting forth appropriate adjustments to Revere's claim for various issues, including this one. Revere has not questioned OPIC's calculation of interest and we therefore direct an adjustment in the amount claimed by OPIC on this item, namely $4,237,000.

(c) *Allocation of Revere Overhead to RJA*

Revere charged to RJA research and development work done by Revere for RJA. It also charged RJA for the time and expenses of all other Revere personnel when in Jamaica. These charges seem to have been confirmed with a letter agreement of June 24, 1968 between RJA and the Government of Jamaica as to general head office overheads. Revere apportioned overhead among its other subsidiaries in a different way, namely on the basis of the respective gross sales of the various subsidiaries. The parties disagree as to whether that other method would have produced a larger or a smaller aggregate charge to RJA than the charge actually made. We make no finding on that subject. In any event OPIC objects on the basis of Section 2.09 and Section 482 of the Internal Revenue Code to the method applied by Revere as to RJA. The only method specifically urged by OPIC would produce a charge of approximately $5,000,000 as of August 31, 1975 and presumably not less than $4,000,000 as of June 30, 1974, the date of Expropriatory Action, vastly more than the amount actually charged.

The evidence on this point was inconclusive, as it probably had to be in view of the magnitude, if not impossibility, of determining at this date how much time of what individuals in the head office was devoted to RJA affairs and, beyond that, how much of that time was in the category

of what might be called stewardship expenses, properly chargeable to Revere even under Section 482, and how much should be charged to RJA. We have no reason to find that the Revere charges were unreasonably low and we do not make that finding.

(d) *Transfer Pricing*

In view of our decision that the Date of Expropriation for the purposes of the OPIC Contract was June 30, 1974, it is not necessary to determine whether Revere's prices for alumina purchased in 1975 were too high and required adjustment in accordance with the arm's length standard of Section 482.

The price paid during the first half of 1974 was $64.30. If anything, this appears lower than what would have had to be paid for a long term contract on an arm's length basis. We find no need to adjust the price at June 30, 1974. Its relevance is anyway taken care of in the write-down.

(e) *Allocation of Income Tax Credits*

Revere filed consolidated income tax returns for itself and its subsidiaries in which the losses of RJA were reflected. A tax credit was allocated to RJA, reducing the RJA loss and increasing the book value of the RJA common stock accordingly. OPIC contends that no such credit should be allocated to RJA for the purpose of computing Revere's Net Investment under the OPIC contract. We agree.

The accounting literature has much to say on this highly complex subject. There is no one generally accepted accounting principle that applies in all situations. In the absence of some special reason for adopting some other method, it seems that the allocation may be made in whatever manner the parties agree, provided full disclosure is

made of the method used and the resulting effect. A variety of other methods is permitted, perhaps required in some circumstances, always in an effort to provide financial statements that fairly state the situation with full disclosure.

Our problem, as we see it, is not to sort through the mass of literature on this subject, coming up with a pronouncement as to how Revere should have handled this difficult problem year by year. On the contrary, we are to determine the amount of Revere's Net investment in RJA as defined in the OPIC Contract. That includes the statement in Section 1.28 that the amount of the Investment shall be adjusted for earnings and losses of the Foreign Enterprise, i.e. RJA. We do not think a proper calculation of RJA's losses for the purpose of the OPIC Contract requires any analysis of the possible benefit of those losses to the consolidated group or of the reasons for or against any credit Revere may have given to RJA in that area. RJA never made a profit. On the contrary, its losses increased year by year at a startling rate until it closed down in August, 1975, and have continued down to the present moment. The likelihood that RJA could ever benefit from the allocated tax credits is remote, to say the least. Such an allocation as the basis of an award in this proceeding would not produce a fair and equitable result within the meaning of the OPIC Contract.

(f) *Depreciation*

For depreciation purposes RJA used a straight line method with a 25 year life. OPIC contends that the life was too long or in the alternative that there should be varying lives for different categories of assets aggregating a higher net depreciation than that produced by Revere's method.

Since we have directed a significant write-down based on recoverability we do not reach this question.

(g) *Write-Down of Non-Usable Equipment*

Again, in view of our finding as to a write-down based on recoverability, we do not need to consider whether there should be a write-down of specific equipment said by Richard Roberts to be of no value to an expanded plant.

(h) *Development and Exploration Costs Capitalized*

Among the assets capitalized on the books of RJA were development costs and exploration costs that were incurred in the initial phase of RJA's development. Part of these costs were classified as "office and general". Statement No. 2 of the Financial Accounting Standards Board (FASB Statement No. 2) requires all research and development costs to be charged to expense when incurred except for activities that are unique to enterprises in the extractive industries, listing types of such activities that need not be expensed when concurred. OPIC's accountants state that office and general expense does not fall within the exception, and this position does not seem to be questioned by Revere. FASB Statement No. 2 was effective January 1, 1975 and requires that costs previously incurred and improperly capitalized must be retroactively expensed by prior period adjustment. We have no evidence that any such rule was in effect on June 30, 1974, the date of Expropriatory Action, and we therefore find for Revere on this item.

(i) *Depletion Charges*

Depletion charges were based on the original estimate of available ore within RJA's mining lease. OPIC contends that the charges should have been increased for the

calendar year 1973 and subsequent years due to questions that were raised as to the validity of the original estimate. An increase in any year would correspondingly increase RJA's loss in that year and reduce the book value of the RJA capital stock. The amount of usable ore necessarily depends on the nature of the processes by which the ore is converted to alumina and it is admitted that RJA was attempting and was at least making some progress in its efforts to develop new processes better adapted to the type of ore available. We find no adequate reason to question RJA's depletion charges at least up to June 30, 1974, the date of Expropriatory Action.

(4) *Conclusions*

Counsel for OPIC have helpfully supplied us with Tables showing the various adjustments required to be made to Revere's Net Investment based on a Write-Down for Non-Recoverability and the application of Section 482 standards. Applying them to the conclusions set out above in Part Two of this Award, we arrive at the following results:

Net Investment per 6/30/74 Balance Sheet		$64,131,000
less write-down of Machinery Equipment and other Productive Facilities*		46,328,856
		$17,802,144
Less disallowance of tax benefits and imputation of interest charges	$12,434,000	
	4,237,000	16,671,000
Net Investment at 6/30/74 after adjustments		$1,131,444

* The item "Machinery, Equipment and other Productive Facilities" does not appear on the Unaudited June 30, 1974 Balance Sheet. If one takes the difference between the amount of $70,287,712 shown in Note 5 to the Audited December 31, 1973 Balance Sheet and the amount of $76,370,002 shown in Note 6 to the Audited December 31, 1974 Balance Sheet, or $6,082,290, and divides the difference by two, an amount of $73,328,856 is arrived at for June 30, 1974. Reducing this item to $27,000,000 results in a Write-Down of $46,328,856.

Part Three

Revere Claims for Reimbursement and Interest

Having decided the amount of compensation to be paid Revere for its Net Investment in RJA at June 30, 1974, adjusted for the write-down of the plant, the disallowance of the tax credits, and the imputation of interest on the Revere advances, we are left with the Revere claims for reimbursement of Bauxite Levy and Royalty payments; of costs of the Supreme Court proceeding in Jamaica; and of expenditures made to maintain the plant after the shutdown in August 1975; for the refund of fees paid OPIC for insurance; and for the payment of interest on Net Investment to be paid by OPIC.

(1) *Reimbursement of Bauxite Levy and Royalty Payments*

Revere's claim for reimbursement of Bauxite Production Levy payments made for 1974 and 1975 is $9,473,967 and for reimbursement of increased royalty payments $140,153, or a combined total of $9,614,120. Revere also claims interest on these payments.

OPIC's position is simple. Its obligation to pay compensation is defined in Section 17.01. This provides that the compensation to be paid for losses resulting from Expropriatory Action is the "loss by reason of" that Action,

"determined in accordance with Section 18.01". Section 18.01 says the loss "shall be the Net Investment determined as of the Date of Expropriation". It says nothing about reimbursement for payments made for taxes or maintenance or lawsuits or anything else. Furthermore, Section 3.05 says "liability to . . . pay compensation . . . is limited to the amounts herein expressly provided for . . . compensation". We agree with OPIC that this liability is limited to the payment of Net Investment as defined in Section 1.28.

In the case of the Levy and Royalty payments in 1974 and 1975, funds must have been provided by Revere in view of RJA's constant losses. Its sole source of funds anyway was Revere. During this period the prices paid for alumina were less than RJA's costs, so that RJA's liability for these large payments to the Government would have had to be met by its parent. As Revere did not increase its stockholding, the amounts must have been added to their advances to RJA and be included in the "Amount due to Parent Company". At June 30, 1974, this was $30.255 million; at December 31, 1974, $36.299 million; at December 31, 1975, $36.710 million; and at December 31, 1976, $37.590 million. These amounts appear to remain indebtedness of RJA and a claim on its assets ahead of the equity. The OPIC Contract does not require OPIC, as part of compensation under Section 17, to pay off indebtedness to stockholders, whatever the reason may have been for its creation. We have not considered or made any determination regarding the amount of RJA indebtedness to Revere. As distilled, our question became simply to determine Net Investment as of June 30, 1974, the date of Expropriatory Action.

(2) *Reimbursement of Jamaica Court Action Expenses*

Revere construes Sections 2.12 and 2.13 and Clause (2) of Section 1.15 to require it to contest the Jamaican Government's Expropriatory Action in the Jamaican courts. Having proceeded accordingly, it demands reimbursement of the expense incurred by it, amounting to $342,573, plus interest on this sum to the date of payment.

It is first necessary to determine whether the obligation set out in Section 2.12 to "take all reasonable measures to pursue and preserve any and all administrative or judicial remedies which may be available in connection with . . . the Expropriatory Action" and in condition (2) in Section 1.15 not only required RJA to sue the Government in the Jamaica Courts but imposed on OPIC an obligation to reimburse Revere for the cost of having done so. Whatever the first requirement may be, we conclude that the latter obligation does not arise unless OPIC requested the action and agreed to reimbursement. As the panel in the *Valentine* arbitration pointed out, failure to exhaust local remedies would not prejudice the United States Government as assignee and subrogee. Therefore, the lawsuit cannot be said to have been taken "for the benefit of the United States" (Section 2.13). Anyway, Section 2.13 merely provides that the Investor shall not be obligated to take action "unless reimbursement for . . . expenses by the Government of the United States is made available".

After Revere had decided that the lawsuit should be brought in Jamaica and had prepared the necessary papers, it asked OPIC whether such suit would be considered by OPIC to be provocative action within the meaning of Section 1.15(4). OPIC agreed that it would not. Revere also wanted OPIC to confirm that it did not waive the contrac-

tual requirement that Revere take all reasonable measures, including judicial procedures, to prevent or contest Expropriatory Action. OPIC replied that it did "not take a position as to the necessity under the Contract of Guaranty for the proposed actions". It recognized that the actions appeared to be "reasonable under the circumstances" and "to be actions Revere may feel called upon to pursue, both in its general interests and in order to avoid possible prejudice to its rights under the Contract of Guaranty". We cannot find in this exchange any agreement by OPIC to reimburse Revere for its lawsuit expenses.

(3) *Plant Maintenance Expenses*

The third category of expenses for which Revere claims reimbursement is plant maintenance and protection. The amount claimed since the shutdown in August 1975 is $3,818,510, plus interest. Revere argues that it would be "grossly unfair" for OPIC to receive the benefit of these maintenance and preservation expenditures which Revere was required to make, or otherwise risk its insurance coverage, and to refuse reimbursement. OPIC, however, advised Revere in April, 1976, that it would not agree to provide reimbursement. We conclude that OPIC is not required by the Contract or by principles of equitable restitution to pay Revere the amounts advanced by it to RJA for plant maintenance and preservation.

As in the case of amounts advanced for the Bauxite Levy and Royalty payments, and presumably also for the Jamaica lawsuit, these advances were added from time to time to the RJA balance sheet item "Amount due to Parent Company". As OPIC points out, "Revere can be expected to assert creditor rights vis-a-vis RJA on account of

Revere's substantial advance to RJA and these rights, if valid, would give Revere a preference to the proceeds of a sale on liquidation of RJA". In other words, having made these advances as loans to RJA and not as contributions to share capital, they fall outside of Net Investment and, consequently, outside the scope of OPIC's obligation under Section 17 to compensate Revere for loss of its Net Investment.

(4) *Return of Insurance Premiums*

OPIC has agreed to repay all amounts paid by Revere for insurance since the Date of Expropriation. As this date was June 30, 1974, the question raised by Revere of recovering part of a premium where the Date of Expropriation falls within and not at the end of an insurance year does not arise.

(5) *Interest*

The last claim of Revere is for interest on the amount of Net Investment and the amounts to be reimbursed. We have given careful consideration to Revere's contentions, particularly as regards interest on the amount of Net Investment. Here we agree with OPIC. Contrary to Revere's contention, the amount is clearly not a liquidated amount. It has taken extensive testimony, many exhibits, lengthy arguments by counsel and a thorough examination by the Panel to determine what the amount of Net Investment was at the Date of Expropriation. OPIC was entitled to have this determination made by arbitration. Until this Award is issued, the amount is clearly unliquidated and their obligation to make a payment undetermined.

If the amount of the Award is not tendered by OPIC to Revere within a reasonable time after the date of the

Award, the Award should bear interest. We fix 60 days as such reasonable time and direct that the Award shall bear interest at 6% per annum from a date 60 days after the date of this Award unless OPIC had made a prior tender of the amount of the Award. Whatever may be the validity of OPIC's various arguments that interest may not be charged against it even as to liquidated amounts, we think those arguments are overridden, at least to the extent of our ruling, by the procedures of the American Arbitration Association authorizing arbitrators to direct payment of interest (Manual for Commercial Arbitrators footnote 6). The OPIC contract calls for arbitration pursuant to the Commercial Arbitration Rules of that Association.

PART FOUR

Amount of Award

We find for Revere in the amount of $1,131,144 plus interest on the basis stated above.

As this Award is in favor of Revere, we direct that the costs of this arbitration, exclusive of Revere's attorneys' and witness fees and expenses, shall be paid by OPIC.

/s/ G. W. HAIGHT
G. W. Haight

/s/ CARROLL R. WETZEL
Carroll R. Wetzel

August 24, 1978

PART FIVE

MINORITY OPINION

I dissent from the result reached by a majority of this Tribunal in favor of Revere Copper and Brass Incorporated and I vote for an award in favor of Overseas Private Investment Corporation to dismiss the Revere claim. In my view Revere has not established on the record before the Tribunal that the acts of the Government of Jamaica which constitute the basis of the claim, come within the express terms of guaranty in the OPIC contract with Revere. (Sec. 1.15[d]).

By these express terms of contract of guaranty, to recover against OPIC Revere must demonstrate that acts of the Jamaican government have "directly" resulted "in preventing" Revere "from exercising effective control over the use or disposition of a substantial portion of its property". Revere's proof falls short, and far short, of meeting the requirement of this stated condition.

The definitive meaning of the term "expropriatory action" as used in the contract of guaranty not only is of decisive importance in the resolution of this immediate controversy, but its meaning as expressing an intent to cover, and to be covered, is significant to American enterprises contracting with OPIC for protection of projects in foreign countries and to OPIC in an ability to lay down clear boundaries in the areas intended to be covered by protective guaranties.

The language defining "expropriatory action" suggests careful and perhaps composite draftsmanship, and although commentaries may throw some light on meaning where ambiguity leaves meaning in doubt, the primary key to meaning is the language actually used. This should be tested

by commonly accepted standards of expression and by commonly accepted meaning of words employed in expression.

The opening sentence of Sec. 1.15(d) lays it down definitively that "expropriatory action" is action by the government of the project country which for a period of one year directly prevents the investor from doing something.

There is here heavy stress on the word "action" which first appears in the term being defined, and then appears in the definition of the term itself. It is the critical term in this claim. There must be an immediate and not an intermediate consequence of the action—it must have the direct effect of preventing the investor from controlling or using its property. It is action which "directly results in preventing" enterprise activity.

In looking at this language, the seller and the purchaser of the contract of guaranty must visualize from its text a variety of then unspecified future governmental actions which could take many forms, from outright expropriation in the classic sense to interference with the enterprise by action not amounting to classic expropriation, which it was intended to cover or to exclude.

The language of paragraph (d) which all three members of this Tribunal regard as controlling on the Revere claim, throws direct light on this intent in the statement of definitive terms of coverage. What is stated to be within the definition is an act of government which prevents the investor from "exercising effective control" over the "use or disposition" of "a substantial portion of its property".

This must necessarily have been written, and have been read, as meaning that the host government by the exercise of public power has interposed itself upon or into the enterprise in a manner directly to have deprived the investor of an ability to act normally in respect of its property.

Again the relevant test here is the "act" resulting in directly "preventing" the investor from exercising rights in the enterprise and neither the repudiation or breach of a contract can in the abstract have that direct effect unless action resulting in actual prevention accompanies the breach or repudiation.

This would be clear enough from a careful reading of the language defining "expropriatory action", but the draftsman with additional caution spelled it out in terms. In the final sentence of Section 1.15 it is laid down in explicit words that the abrogation, impairment, repudiation or breach of "any" contract or agreement shall be considered expropriatory action "only if" it meets the terms of definition stated earlier in the section.

It follows, therefore, from my construction of the language of the contract of guaranty that it was not intended to include within its coverage the governmental action experienced by Revere in Jamaica, and the language should not reasonably have been read by Revere to have embraced that kind of Governmental Action.

Nevertheless a majority of this Tribunal, a majority composed of lawyers of wide experience and high ability, have read the application and effect of the same language differently, diametrically, than I have read it. This suggests some failure of draftsmanship in this vital area of contractual undertaking. The long and earnest resistance by OPIC to the Revere claim could only have resulted from OPIC's belief in good faith that the language it fashioned and relied on shielded it from liability in this sort of factual situation.

The award being made for Revere against OPIC demonstrates that OPIC's judgment of the legal effect of the conditions of its contract may be mistaken. At least that

is the result in this case, and if its policy continues to be not to give its guaranty in situations such as the Jamaican action related to Revere, it must devise other language to effectuate its policy. The literal language of its present contract has not brought that protection.

I think, nevertheless, I am required to develop the legal basis under the present contract on which in my judgment a proper award should be made.

In initiating its enterprise RJA entered into a written agreement with the Government of Jamaica on March 19, 1967 which obligated each party to perform enumerated conditions. Among other things the Government undertook to impose no additional taxes or levies than were effective at the time of contract. The enactment of the bauxite levy (Production Levy) on June 8, 1974 effectuated by the actual enforcement of payment of the levy by RJA to the Government of Jamaica breached the condition of the 1967 contract that no additional taxes would be imposed by the Government on RJA.

OPIC has expressly laid it down in precise contractual language that it does not guarantee performance of contracts by the Jamaican Government or assume any responsibility to pay for their breach or repudiation unless the acts of Government clearly meet the specifics of "expropriatory action" stated in the contract of guaranty.

Notwithstanding this languge, the majority of the Tribunal concludes that "the actions taken by the Government of Jamaica, having effectively put an end to the 1967 Agreement, directly prevented RJA from exercising effective control over the use or disposition of its property". This record shows a breach of the 1967 agreement, but it does not show, nor does it follow from this breach, that any act of the Government of Jamaica, "directly pre-

What comes to mind at once is the government's taking over the enterprise and ousting the investor from it.

But the definition means more than that because it says more than that. It is important to see what else, and what more, were intended to be covered. One situation that a reader of the language would expect to be covered would be a consistent series of governmental actions continuing during a period of a year, each discrete act depriving the investor of the use or disposition of a small portion of its property, but in totality amounting to a "substantial" portion. Each action, taken alone, would be insufficient to meet the test, but all together would meet it.

Another would be the enforcement (not merely the enactment or promulgation) of a public regulation for a period of a year which in a number of occasions, significant in the total, directly limited the way the enterprise can operate and make "use" of its property. Another would be the enforcement of a public regulation which directly prevented the investor from transferring the project or a substantial portion of it, thus affecting its "disposition". Other and similar acts of prevention would come to mind.

The kinds of governmental action not within the scope of coverage are likewise denoted by the language of definition. One is an act of the host government which directly prevents the investor from exercising effective control of use or disposition of the enterprise property, but where the property thus affected does not add up to "a substantial portion" of the property constituting the project. What is a substantial portion is a fact question, but it is one that must be reasonably viewed. What is "substantial" must be measured, up and down, by the size of the enterprise.

Another act of government that one would not expect to come within the stated coverage would be a public regulation interfering with the operation of the project to the

extent it would be more expensive or difficult to operate it, but which fell short of preventing the investor from exercising effective control over the enterprise in a substantial respect. Examples of this might be increased inspection, additional requirements for reporting, or explanation to or consultation with the host government.

The language defining "expropriatory action" makes it apparent that coverage depends on long continued measures of the host government which impair the ability of the investor to carry on the enterprise because, and only because, it was stopped from exercising normal and effective control and use of a large part of the property of the enterprise.

Many acts of government which might pose potential threats to the enterprise would obviously not meet the test of prevention which the definition lays down as a condition of coverage. One would be the publication and enactment of a statute requiring administrative implementation which if implemented would interfere directly with control and use but which is not in fact carried out. Another would be the published policies of officials which are neither carried out nor implemented. The language of definition is manifestly cast carefully not to embrace just such situations where there is no direct prevention of use or control of property.

In the same general category would be a breach or repudiation of a contract between the investor and the host government not to take specified public action against the enterprise. The test applicable to breach or repudiation of contract asserted as "expropriatory action" would be identical with that applied to other governmental measures: whether the breach or repudiation directly deprived the investor of effective control over the use or disposition of a substantial portion of its property.

vented" RJA from "exercising effective control" over the use or disposition of its property.

The contract which is the subject of this arbitration is not a contract between Revere and Jamaica, but a contract between two American corporations entered into in the District of Columbia and containing a provision for the arbitration in the District of Columbia of disputes arising under it. The contract and its interpretation are thus governed by the law of the United States and not by International Law.

Heavy stress is placed by the majority on the international character of the contract between Jamaica and RJA and on the effect that a breach or repudiation of such a contract could have in bringing home a liability to Jamaica under international law before a tribunal having jurisdiction of that country. But that is not this present controversy and international law is not the standard, and indeed is quite irrelevant, to the rules of law which should guide this arbitration to which neither RJA nor Jamaica is a party.

It seems significant that although in subsequent contracts between Jamaica and aluminum companies made in 1974 and 1976, as the majority points out, contained provision for international arbitration, no such provision was made in the 1967 contract with RJA and the omission must be deemed intentional.

The interpretation of the Revere-OPIC contract before this Tribunal must, therefore, be in accordance with the standards of American law. The definitive terms of the contract carefully, and I believe intentionally, rule out general principles of International Law relating to expropriation of foreign enterprises as a basis of liability of OPIC to Revere, and set up a very different standard of

what is expropriatory action. This is the controlling contractual rule fixed by the parties between themselves and must govern the adjudication of the present claim.

Thus the enactment by the Government of Jamaica of the bauxite levy in breach of its contract with RJA, and public statements by Government officials disavowing the contract between Jamaica and RJA, may well be expropriation of a foreign enterprise under international law standards, as the majority says, but it is not "expropriatory action" within the express terms of the contract between the parties and hence does not entitle Revere to recover against OPIC.

There seems to me no sound legal basis to apply to this case standards other than the precise words of the contract of guaranty, to determine the liability of OPIC for the acts of the Government of Jamaica.

Although the majority opinion discusses in depth the application of International Law principles as a basis for imposing liability on OPIC, it is apparent from the development of its discussion supporting an award for Revere, that it does not regard recourse to International Law alone as a sufficient ground for an award against OPIC under this contract, because its opinion turns to the literal terms of the Revere-OPIC contract, entirely independently of International Law, as a basis for an award for Revere.

The opinion observes not only that this "is not a claim against the Government of Jamaica for damages for breach or repudiation of the Agreement on the ground that such action constituted a violation of international law," but, as I also see the case, the "sole" question for a decision is whether the Jamaican actions "directly prevented RJA from exercising effective control over the use or disposition of a substantial portion of its property or operating the same."

In addressing this issue, the decisive language of the majority in finding direct prevention from exercising control over a substantial portion of RJA property seems to be this: "Here 'effective control' not only of the contract but of the entire operation has been lost, due directly to the action of the Government".

The factual record made before this Tribunal does not, in my opinion, sustain this sweeping conclusion. RJA remained in full control of its plant and of its business. The Jamaican government did not prevent RJA from managing its plant, or operating its business, or exporting alumina or by expropriation or otherwise directly prevent it from effective control of a substantial portion of its property.

What happened to RJA is that a tax was imposed which breached the terms of the contract between Jamaica and RJA. It cannot fairly be held that this tax caused a loss of "effective control" by RJA "of the entire operation". And the record does not support a finding of such loss of control by any other act of Jamaica.

The enactment and collection of this tax forms the main basis of Revere's claim here that there was "expropriatory action" within the OPIC contract. But although this tax was substantial in amount, it was the kind of levy which could be passed along to the consumer of aluminum, was applied alike to all alumina enterprises in the country and in the circumstances of this case did not meet the contractual description of "expropriatory action".

Significantly, the majority of this Tribunal does not find that the enactment of the Bauxite Levy itself to have been sufficient to bring the claim within the OPIC contract of

guaranty, and, indeed, the finding is expressly the other way. The majority observes: "In any event, we agree with OPIC that the levy was not confiscatory and that it did not prevent RJA 'from exercising effective control over the use or disposition of a substantial portion of its property.'"

Nor is the authorization in the amended statute to the Government to revise the mining lease expropriatory action. The majority notes that "specific revocation of the mining lease has not taken place" and there was certainly here no direct prevention by act of government of the exercise by RJA of rights under the lease.

It thus becomes clear that the decision of the majority does not rest principally on the bauxite levy or the statute authorizing revision of leases, but rather on the general course of public policy by the Government of Jamaica. It is observed that RJA is "no longer protected by a contract". This is a statement of a general legal conclusion rather than a finding, as the OPIC Contract requires, of a direct prevention of effective control.

Additionally there are two difficulties with the statement that RJA is no longer protected by a contract. One is that under the Constitution of Jamaica the general terms of the contract remain enforcible as the recourse by RJA to the Jamaican courts demonstrates. The only part of the contract held to have been *ultra vires* was the agreement by public officials not to impose additional taxes, which would be a reasonably arguable question in any jurisdiction. The other is that even if RJA were "no longer protected" by a contract there must be a demonstrated direct consequence of deprivation of control to bring the generality within the specifics of the OPIC guaranty.

An additional basis on which the majority finds that OPIC is liable here is that Revere "could hardly state in a future prospectus under the Security Act that its rights were protected by an agreement with the Government" but would have to spell out the action taken by the Government and "emphasize the resulting insecurity of its position". It is added that "It could no longer merely maintain a brave front pretending either that the 1967 Agreement was still in full force and effect or that its rights were otherwise protected under Jamaican law." It is not easy to see the relevance of this to "expropriatory action" as here defined.

Whether the arrangement between RJA and Jamaica was or was not similar to a concession contract, which seems a significant analogy drawn in the majority opinion, is quite immaterial. This was not a concession contract and the majority agrees that RJA mining lease has not been revoked. The opinion continues on this: "the effects of the Jamaican Government's actions in repudiating its long term commitments to RJA have substantially the same effect on effective control over use and operation as if the properties were themselves conceded by a concession contract that was repudiated". A repudiated concession contract would stop the operation. Nothing like this happened to RJA and the analogy seems to me to be inconsistent with the actual record made before the Tribunal.

In addressing the terms of the OPIC contract of guaranty, the majority considers what was intended by the parties in the use of the term exercise of "effective control" over the property of the enterprise. It is noted that this must be a "practical and not merely theoretical control. This is not a legalistic but a practical problem". The terms of the contract we are construing do not admit of this generalization. The contract is cast in careful legal language;

it defines "expropriatory action" in terms which seem to me unmistakable and which certainly were not intended to be altered by practical considerations.

The majority concedes that the OPIC argument that RJA has all the rights and property that it had before the events of 1974 "may be true in a formal sense". I do not know how it can be disputed that this is true in a factual sense. There was certainly more than formal control over its property exercised by RJA. The factual recitation of the OPIC argument recited in the majority opinion, i.e. that RJA "is in possession of the plant and other facilities; it has its Mining Lease; it can operate as it did before" is entirely consistent with the record before the Tribunal.

But despite the retention by RJA of all these actual rights over its property and operations, the majority concludes that RJA's "control" over the use and operation of its properties is no longer "effective" because of the "destruction" by governmental action of its contractual rights. These are generalizations which fall far short of meeting the exacting criteria of the OPIC Contract. It is against just such generalizations that the language of OPIC's contract of guaranty was designed. The language requires a claimant to show that the governmental action has directly prevented him from control of his property. When one searches this record to see what the actual facts are upon which the majority finds RJA has lost "effective" control of its property by the "destruction" of its contract with Jamaica, it is seen that nothing has actually happened to RJA in respect of its property except that it has been required to pay a tax which the Government had contracted not to impose. This, and the consequences to RJA, are plainly not "expropriatory action" within the terms of the OPIC Contract.

Revere's own perception of the acts of the Jamaican Government relating to RJA's operation, as those acts occurred and immediately thereafter, was that the enactment of the Bauxite Levy and not a generalized loss of effective control of the enterprise constituted the expropriatory action on which to base a claim against OPIC.

Very early in the development of its claim Revere specified to OPIC the Levy as the basis of its claim. On June 25, 1974 Revere notified OPIC in response to a contract requirement that claimant notify OPIC of "any action" which it believes will become "expropriatory action" that the Bauxite Levy "or actions of the Government of Jamaica taken in accordance with its provisions, may constitute expropriatory action". This is not a far-ranging claim of loss of its contract or its ability to operate its enterprise, but a specifically directed complaint about the levy. The whole thrust of Revere's case on this record has been an enlargement of this assertion.

In the formal application by Revere to OPIC of April 14, 1976 there is no charge that Jamaica interfered with or prevented RJA from the management of its business or control of its property. There is a whole series of specific complaints addressed to enumerated items, but it is not possible to find in the language of that instrument the theory espoused by the majority of the Tribunal in reaching its award.

Beginning with its original claim for compensation, and reiterated constantly through the hearings, the exhibits and the briefs, the heavy stress of Revere's case has been directed to the loss of property through the bauxite levy. The overall direction of this proof and argument by Revere is so strong that OPIC draws the conclusion that "the

bauxite levy is the only Jamaican Government action which need be considered by the panel in this case".

By any reasonable standard the bauxite levy which Revere treats as expropriatory is within range of the proper taxing power of the Jamaican nation. Neither Revere nor its subsidiary RJA paid any income tax to Jamaica. The bauxite levy imposed in 1974 was measured by 7.5% of the average realized price of primary aluminum produced from the bauxite extracted in Jamaica.

The record indicates that two tons of alumina were required to produce one ton of aluminum. The average price of primary aluminum was affected by the transfer price which Revere paid its subsidiary—a price controlled by Revere. It thus would have been impracticable to have based a tax on the price paid for the alumina produced in Jamaica and shipped to the United States, and the average price for the ultimate aluminum was both affected by the general market in aluminum and a measure of the value of the ore extracted from Jamaican soil.

In effect, therefore, the bauxite levy was rather similar to a gross receipts tax. Depending on the basis of computation, this would range from 15 to 35 per cent. In 1974 a total of 178,831 short tons of alumina were delivered by RJA to Revere. At the transfer price fixed between them, RJA was credited with $15,800,515 which works out to $88.35 per short ton of alumina. RJA paid the bauxite levy for 1974 of $2,773,000 and paid an additional sum of $397,000 in 1975 chargeable to 1974 operations—a total for that year of $3,170,000 on the 178,000 short tons of alumina delivered to the parent company.

Therefore, the levy actually was $17.73 per short ton of alumina delivered, which amounts to 20.1 per cent of the $88.35 transfer price. The amount of this tax reflected

the benefit of a subvention of the tax granted by the Jamaican Government at the request of RJA. Without this subvention, the tax would have been higher for 1974, equalling about 34 per cent of the transfer price.

But "expropriatory action" is to be measured by what was actually and directly done in the imposition of the tax, rather than what would have been done had the subvention not been allowed. The actuality was that the tax approximated 20% of the transfer price for 1974.

In 1975, the year after the expropriatory action claimed by Revere, the alumina plant was shut down during a portion of the year, but during the operation of the plant Revere increased the transfer price of alumina to RJA from $88.35 to $125 per short ton. During this year RJA paid a higher bauxite levy than in 1974, amounting to $6,721,000 on a sales computation to Revere of $18,742,600, which is a rate of 35.9 per cent.

But OPIC correctly argues that this computation overstates the impact of the levy because had RJA operated for the full year and shipped as much alumina as it had in 1974, it would have been credited with $22,353,875 by Revere. Based on the amount paid in 1975 this would work out to a rate of 30.1 per cent. But if the transfer price of $125 per short ton agreed between Revere and its subsidiary in 1975 is applied to the net bauxite levy of 1974, it would work out to a levy of approximately 14 per cent. Besides this, the Jamaican Government offered Revere further relief from the tax in 1975 and later years if the plant had been continued in operation.

These calculations indicate that the highest adverse effect on Revere from the bauxite levy would be 35 per cent of the gross receipts from alumina; while the lowest would be about 15 per cent. A fairly accurate measure of this

levy would be 20 per cent; and by any standard this lies well within the reasonable range of the taxing powers of the government and is not by any standard confiscatory.

The amount of the tax actually imposed is important and embraces the main thrust of the Revere case before the Tribunal. Thus, the reasonableness of the tax and the magnitude of its impact on Revere are significant factors in determining the issue of "expropriatory action".

Neither the actual amount of the Bauxite Levy nor the manner of its imposition is unreasonable by normal standards of tax enactments in the international community. For example, the government of Iceland levied a tax of 25% on all property of individuals valued in excess of three million krone. The international tribunal which reviewed it, concluded that the assertion by claimant that it was confiscatory was not sustained (*Gudmundeson* v. *Iceland,* 30 I.L.R. 253 [Euro. Comm. Human Rights, 1960]). The claimant had argued that the levy followed closely on another 25% tax on large holdings and that even if the tax could be paid in installments it would exceed the income that could be realized.

The question of excessive taxation to the point of expropriation is not necessarily answered by the type of tax, e.g. whether it is an income tax, or a tax on doing business, or a tax on extracting minerals or oil. The test is the reasonableness of the determination that the activity or the profit shall bear a part of the cost of government. Jamaica was not required to decide at the risk of an international adjudication of expropriation to tax only profitable operations in the processing of alumina and thus be required to exempt from all taxation operations such as RJA which might not be profitable during a specified period. Indeed it has been observed that "most other

nations derive their greatest revenues" from taxes other than income taxes (M. Pomeranz, *Taxes of U. S. Investment in Latin America,* 44 W. Va. L. R., 205). A company of the size of RJA which on an investment of $100 million normally expected to generate a net income of at least $10 million, would in most European countries pay taxes well in excess of the bauxite levy on RJA. That RJA for reasons not attributable to the Jamaican Government did not in the limited period involved here generate a profit should not invalidate a tax which in essential theory of imposition is a gross receipts tax.

Taxes based on gross revenues or on the extraction of minerals in which profitability is not a necessary concomitant are fairly common in Latin America. Examples of these are Guatemala's 48% tax on behalf of the gross receipts of non-resident motion picture operations (a 24% tax); Venezuela's 72% tax on net income of oil companies and 60% on mining companies.

Even if RJA had to absorb the full effect of the Bauxite Levy, it would not be confiscatory by international standards. But my finding is that it did not have to absorb it and its parent Revere was able or, in a normal aluminum market would have been able, to pass on to the ultimate consumer substantial parts of the Bauxite Levy.

By the standards followed in the domestic law of the United States, the Bauxite Levy would not be treated as confiscatory. A good illustration is *Pittsburgh* v. *Alco Parking Corp.* (417 U.S. 369 [1974]). There the City of Pittsburgh had imposed a tax of 20% of the gross receipts of a privately operated parking facility. This did not depend on a profitable operation; the gross receipts were the measure of the tax whether a profit was or was not generated.

The tax was almost identical in magnitude and operational effect with the Jamaica Bauxite Levy. The Supreme Court upheld its validity against the claim that it was confiscatory. Other issues were considered and decided in the case, including the effect of the competition by public facilities with Alco, but the totality of the effect of the tax on the private operator, even when there was added to it the adverse effect of public business competition, was not held to be confiscatory. Mr. Justice White observed that "This court has consistently refused . . . to hold that a tax is unconstitutional because it renders a business unprofitable" (417 U.S. at 373).

And in *Sunshine Anthracite Coal Co.* v. *Adkins* (310 U.S. 381) the Supreme Court held that a tax of 19.5% on the market value of coal mined was valid. There were other questions there, too, including discrimination and the power of Congress to enact the levy—but the issue was expressly presented by the coal company that the tax was confiscatory (310 U.S. at p. 381; Sunshine brief at p. 10).

In the positions taken by Revere in treating with the Jamaican Government contemporaneously with the enactment of the statute and with the policy statements of public officials, there is a complete absence of any suggestion that the disavowal of the agreement not to impose additional taxes was a significant factor. There was certainly no broadly asserted position that all Revere's legal protection in Jamaica had disappeared. Revere's actions and statements in 1975 point just the other way.

For example, the letter of William Collins, President of Revere, to the Prime Minister of July 2, 1975 neither complains of the levy and the royalty actions nor states that the actions of the Government were a cause for the shutdown of the plant. Mr. Collins noted the excessive growth

of primary aluminum inventory at the Scottsboro plant which "exceeds six months' production". He noted the necessity of curtailing Scottsboro aluminum production and that Revere was "weighing a still further cut".

RJA's Jamaica alumina plant was so structured that it "is both small and inflexible so that we could not cut back operations to a 70% level without increasing already excessive alumina costs to the $250 per ton level". Mr. Collins added the factor that seems to have been decisive: "Neither do we have the means to store or any markets in which to dispose of excess alumina production, particularly at anything near its cost".

He noted that Revere was required to close its Jamaica plant "in order to reverse or reduce our negative cash flow" and Revere's banks "strongly" required this. The whole direction of this contemporary description of the source of trouble is that economic and market forces beyond the reach of either Revere or Jamaica had created the problem in the Jamaica plant.

This important contemporary letter is not a complaint about the government, but a request which certainly seems to have been written with the belief it would be favorably met, that the Government help in the feasibility studies which were aimed at making the plant economically viable.

This clearly was the position taken by Revere toward the Government of Jamaica in the summer of 1975. Continuing to address the Prime Minister, Mr. Collins said: "I wish to request that you intervene and assist us in obtaining force majeure relief from the minimum production levy during the period of the shutdown. I would also ask that you assist us in obtaining the consent of the Minister of Mines to the cessation of bauxite mining for a period in excess of six months." The "reopening" would

depend "on general economic conditions" which were obviously the main cause of the shutdown.

What actually seems to have triggered the shutdown of the plant was the failure of Revere to obtain an extension of its labor contract, and the record suggests that this was due in part to union differences and has not been shown attributable to the Government. In this respect the telegram of August 14, 1975 from Mr. Collins to the Acting Prime Minister assumes significance on the cause of the shutdown: "Unable to obtain necessary union assurances to extend labor contract to year end. Accordingly regret we must wind down operations as previously advised." (Revere Ex. 156)

A letter of August 15, 1975 from Mr. Collins to the Acting Prime Minister which amplified this telegram restated the position of Revere that the opening of its plant depended "on general economic conditions" (Revere Ex. 158).

The effect of these general conditions, rather than the actions of the Government of Jamaica, as a reason for shutting down the plant are made more explicit in a letter from RJA to the Minister of Mining and Natural Resources on October 10, 1975. RJA said that "it is impossible for us to justify continued Jamaican mining and production activities at the present time, particularly since other aspects of Revere's business are also feeling the effects of the worldwide recession".

RJA treated its power to shut down operations "no longer economically justified" as a "fundamental right inherent to the ownership of any business enterprise". This right which Revere then regarded as fundamental had not been impaired by any general disavowal of contract and was exercised without interference by the Government of

Jamaica. Certainly political speeches by Ministers had not impaired it.

The contemporary position taken by RJA in relation to the Bauxite Levy on which the case of Revere against OPIC is based was also revealed in a letter of October 10 from RJA to the Minister of Finance: "In the case of Revere and Revere Jamaica, enactment of the Bauxite Levy chilled opportunities and plans for expansion, not only on an internal basis but also as regards participation with other partners . . . it would be violative of both statute and agreement as well as an act of expropriation to continue to subject RJA to minimum production liability at this time". Certainly "chilled opportunities" and chilled "plans for expansion" are not the direct deprivation of property or control of property covered by OPIC's Contract. And, of course, the minimum production requirement had no such expropriatory effect.

In these communications and otherwise RJA was seeking consent of the Government to cease mining activities for a period in excess of six months which the Minister was empowered to grant. RJA added to this an assertion on November 5 that under its contract with the Government of March 10, 1967 it had the right to suspend operations and the agreement superseded "any inconsistent provisions of the mining law".

The agreement was not then regarded by RJA as annulled by the statements of public officials but, indeed, so fully in force as to supersede the statute. Consistently RJA asserted "The cessation of mining operations pursuant to Section 23 [of the agreement] is not dependent upon the consent of any official of the Government of Jamaica." While RJA did not withdraw its request for consent of cessation, it made it plain that because the agreement continued it "did not consider such consent necessary".

What parties to a controversy say in writing contemporaneously with the development of the controversy is an important key to understanding and finding the factual situation—far more reliable than the reconstructions of subsequent testimony or statements. RJA, of course, objected to the Bauxite Levy as did all other foreign companies processing Jamaican bauxite; but it manifestly did not treat the 1967 contract as being at an end but expressly asserted the continuance of the contract in full effect. The only direct effect on RJA was the Bauxite Levy and that is not "expropriatory action" within the OPIC Contract.

The basic difference of view within this Tribunal is concerned with the nature of the "action" by the Government of Jamaica which "directly results in preventing" RJA from "exercising effective control" over substantial portions of its property.

With the contract between Jamaica and RJA actually breached by enactment and enforcement of the Bauxite Levy and future compliance by the Government not clear, the majority concludes that there is no contract and, because of the resulting uncertainty as to business management, it holds there is a direct deprivation of effective control of the business.

That long jump is not supported by this record. Mere discomfort and uncertainty in business planning are just the kind of general consequences not intended to be embraced within the expression "directly results in preventing" control. Here is an indirect and not a direct effect in its manifest sense, and it must be kept in mind that conceptually behind the OPIC definition and informing its meaning is the basic word "expropriation" itself which is the seizure of private property by public power. The OPIC

contract is a refinement and development of that basic concept.

In support of its conclusion that "effective control is gone", the majority notes that "Freedom to make management decisions is at the heart of effective control" and that the focus should be on what "happens to" decision-making "when the contract disappears on which the entire structure was built". It is concluded that with the "contract gone", decisions which require some continuity of the enterprise "simply become gambles" and "there is no way in which rational decisions can be made".

Illustrating this is the situation of a management urgently seeking the services of an "extremely competent technically qualified person to be in charge of a complex enterprise" but is unable to make the long-term contract because of uncertainty resulting from the violation of the Government's contract and unpredictable future action of Government.

The uncertainty and doubt faced by business management in such a situation are, in my view, plainly not the direct prevention of control within OPIC's undertaking of guaranty. There is no resemblance whatever to the actual situation in Jamaica of RJA which not only remained fully in control of its business, but asserted and exercised its legal right to decide and carry out its decision to close down its Jamaica plant for economic reasons.

Expropriatory action within the OPIC contract not having been established, my decision is to dismiss the Revere claim.

/s/ Francis Bergan
Francis Bergan

August 24, 1978

APPENDIX TO AWARD

Section[s] of the General Terms and Conditions relevant to the amount of compensation payable in this case and Section 482 of the Internal Revenue Code.

> Section 1.22 Investment. The term "Investment" means the Investor's contribution to the Foreign Enterprise at the United States dollar value thereof on each Date of Investment. . . . Where the constituent elements are other than cash, the value thereof shall be the lesser of the value agreed upon between the Investor and the Foreign Enterprise and a reasonable value in the United States of America for such elements (normally the fair market value) in accordance with principles of valuation generally accepted in the United States of America. . . .
>
> Section 1.28 Net Investment. The term "Net Investment" means, . . . the amount of the Investment contributed by the Investor for equity Securities . . . adjusted for . . . net retained earnings and losses (including but not limited to realized capital gains or losses . . .
>
> Section 2.09 Books and Records of Investor and Foreign Enterprise. The Investor will maintain . . . books of account and other records, in accordance with accounting principles generally accepted in the United States and consistently applied, covering the amount of the Net Investment . . . and all . . . receipts, expenditures, and transactions by the Investor . . . in connection with the Investment. The Investor shall take all reasonable measures to obtain from the Foreign Enterprise copies of its annual balance sheet,

> income statement, analysis of surplus, statement showing amounts and Dates of Investment, . . . all approved by an independent certified public accountant or other accountant acceptable to AID as prepared in accordance with accounting principles generally accepted in the United States and consistently applied, . . . The amount of the Net Investment . . . and the Books and Records of Investor and Foreign Enterprise, shall be deemed to include the standards of accounting required by Section 482 of the Internal Revenue Code or as it may be amended from time to time and by any regulations issued by the Internal Revenue Service to amend, interpret or implement said section of the Internal Revenue Code. . .
>
> Section 15.01 Elements of Guaranty. Subject to the terms and conditions of this Contract of Guaranty, AID hereby guarantees to the Investor, upon application, compensation in U. S. dollars up to the limit provided for in Article 17 for losses determined in accordance with Article 18 resulting from Expropriatory Action commencing during the Guaranty Period.
>
> Section 17.01 Amounts. The compensation to be paid hereunder for losses resulting from an Expropriatory Action shall be . . . the loss by reason of an Expropriatory Action of the kind described in Section 1.15 (a) through 1.15(d) determined in accordance with Section 18.01.
>
> Section 18.01 Total Loss. The loss by reason of an Expropriatory Action of the kind described in Sections 1.15(a) through 1.15(d) shall be the Net Investment determined as of the Date of Expropriation, less . . . [not applicable] . . .

Section 18.03 Accounting Principles. Loss by reason of an Expropriatory Action shall be determined in accordance with accounting and valuation principles generally accepted in the United States of America and consistently applied.

Section 482 of the Internal Revenue Code provides in part, that "the Secretary may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among [commonly controlled entities] if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any such organizations, trade or businesses."

Supreme Court, U.S.
FILED
MAY 8, 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1572

REVERE COPPER AND BRASS INCORPORATED,
Petitioner,

v.

OVERSEAS PRIVATE INVESTMENT CORPORATION,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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OVERSEAS PRIVATE INVESTMENT CORPORATION,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

The questions stated by the Petitioner should be combined and restated as follows:

1. Should an arbitration award that is issued pursuant to an agreement for final and binding arbitration, and governed by the Federal Arbitration Act, be vacated or modified on "public policy" grounds where the losing party claims that the arbitrators misconstrued a contract by failing to apply a rule of contract construction (*contra proferentem)* that ambiguities in insurance contracts should be resolved in favor of the insured?

Since the arbitrators in this case did not find that the contract was ambiguous, and neither of the lower courts found that the arbitrators had erred in their con-

struction of the contract, the following *initial* question also is presented:

2. Did the arbitrators in this case misconstrue the contract?

STATEMENT OF THE CASE

Petitioner asks the Court to reverse the decision of the lower courts and to modify or vacate an arbitration award in a contract dispute between the Petitioner, Revere Copper and Brass Incorporated ("Revere"), and the Respondent, Overseas Private Investment Corporation ("OPIC").

OPIC is an agency of the United States Government created by statute to administer a government program offering American investors insurance against specified political risks, including expropriation.[1] Revere obtained a contract from OPIC insuring an equity investment in its subsidiary, Revere Jamaica Alumina, Ltd. ("RJA"), against expropriation. The contract provided that all disputes would be resolved by "final and binding" arbitration under the Commercial Arbitration Rules of the American Arbitration Association (2a).[2]

A disputed claim arose and Revere demanded arbitration. After extensive evidentiary hearings, briefing, and oral argument, three neutral arbitrators issued a 123

[1] OPIC is represented by private counsel pursuant to express statutory authorization. 22 U.S.C. § 2199(d).

[2] References to ___a are to pages in the Appendix to the Petition. The arbitration provision was included in the contract pursuant to the Foreign Assistance Act of 1969, which provides that "Claims arising as a result of insurance . . . under . . . this [title] . . . may be arbitrated with the consent of the parties, on such terms and conditions as the Corporation [OPIC] may determine." 22 U.S.C. § 2197(i).

page award (26a-134a). A majority, G. Winthrop Haight, Esquire, and Carroll R. Wetzel, Esquire, held that OPIC was liable and awarded $1,131,144 to Revere. The third neutral arbitrator, Judge Francis Bergan,[3] wrote a dissenting opinion, arguing that OPIC was not liable and that Revere should be awarded nothing.

The legal proceedings that have followed result from Revere's dissatisfaction with the majority's findings that RJA was a commercial failure prior to any alleged expropriatory action and that RJA's huge commercial losses could not be included in the compensation paid for expropriation. Revere argued that under principles of consolidated accounting it was permissible not to recognize all of RJA's commercial losses, and that on a consolidated basis RJA had a "book value" of $64,131,000. The arbitrators rejected Revere's arguments and agreed with OPIC that the contract required that RJA be accounted for as a separate entity, not as a part of a consolidated group with its parent corporation and other subsidiaries and divisions, and that, when properly computed on a separate entity basis, Revere's maximum loss from expropriation was $1,131,144—the amount awarded. In reaching this conclusion, the arbitrators relied in part on the fact that the contract stated that compensation ("Net Investment")[4] was to be determined in accordance with the standards of accounting required by Section 482 of the Internal Revenue Code and that the fundamental standard required by Section 482 is that

[3] Judge Bergan retired from the New York Court of Appeals in 1973.

[4] The contract provided that compensation was to be Revere's "Net Investment" in RJA as of the date of expropriation, and that "Net Investment" was to be determined by a contractual formula, which required that the original amount of the insured investment be reduced to reflect subsequent losses of RJA (132a-133a).

of "an uncontrolled taxpayer dealing at arm's length with another uncontrolled taxpayer" (Award at 86a). They also found that the conclusion that RJA must be accounted for on a separate entity basis was supported by the fact that OPIC's contractual subrogation rights extended only to the shares of RJA as a separate entity, and not to the consolidated group (Award at 87a). In addition, the arbitrators found that Revere's proffered construction of the contract would produce an anomalous and unjust result, because "OPIC would . . . be required to pay an amount in excess of the reasonable value of what Revere claims to have lost as a result of Expropriatory Action" (Award at 90a).

Revere filed a motion under the Federal Arbitration Act, asking the District Court to "modify" or "vacate in part" the award. Revere did not question the impartiality of the arbitrators or the fairness of the proceedings; but it disagreed with their interpretation of the contract—arguing that they "rewrote" the contract and violated "public policy" by failing to construe alleged ambiguities against the insurer, OPIC. The District Court denied Revere's motion, stating that:

> Revere's claims amount to no more than the contention that the arbitrators misconstrued the contract . . . [which] "is not open to judicial review. *Bernhardt* v. *Polygraphic Co. of America, Inc.*, 350 U.S. 198, 203 n.4 (1956)."

With respect to Revere's argument that the arbitrators had violated the rule of *contra proferentem,* the District Court noted, first, that "it is not at all clear that this rule of construction has been violated" and, second, that failure to apply *contra proferentem* would not be a ground for vacating an arbitration award (11a).

The Court of Appeals affirmed, stating that even "a cursory reading of the award indicates that it 'draws

its essence' from the Revere-OPIC contract. *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)." (7a), and that there was no basis for holding that a failure to apply the rule of *contra proferentem* would be sufficient cause for upsetting an award (6a). The court rejected Revere's argument that the award should be vacated because the arbitrators' alleged failure to apply *contra proferentem* violated "public policy," explaining that there was no general "public policy" exception which permitted losing parties to challenge an arbitration award whenever they were able to find some generally accepted principle of contract construction which was transgressed by the award (4a-5a).[5]

ARGUMENT

1. The Decisions Of The Lower Courts Are Based Firmly On Prior Supreme Court Decisions.

In *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), this Court held that an arbitrator's award must be sustained so long as it "draws its essence" from the contract. Under this "essence" test, an award must be sustained

[5] The Court of Appeals also rejected several other arguments that are not included in the "Questions Presented" by the petitioner. It found no merit to Revere's argument that a more rigorous scope of review should apply to arbitration awards under insurance contracts, because the Federal Arbitration Act, which delineates the scope of review, applies equally to all commercial contracts containing binding arbitration clauses (5a). It also gave no credence to Revere's argument that it "was compelled to accept the arbitration provision in its contract with OPIC," and, therefore, should be entitled to a different scope of review—noting that Revere was the party that had requested the arbitration and that Revere's present contention "appears to have surfaced after the arbitration award was announced" (7a).

if it is based upon an arbitrator's honest interpretation of a contract, even though a court might interpret the contract differently. In reversing the Court of Appeals' decision in the *Enterprise Wheel* case, *supra*, this Court stated:

> The Court of Appeals' opinion refusing to enforce the reinstatement and back pay portions of the award was not based upon any finding that the arbitrator did not premise his award on his construction of the contract. It merely disagreed with the arbitrator's construction of it. (363 U.S. at 598).

And, this Court went on to explain:

> Respondent's major argument seems to be that by applying correct principles of law to the interpretation of the collective bargaining agreement it can be determined that the agreement did not so provide [for the result reached by the arbitrator], and that therefore the arbitrator's dedcision was not based upon the contract. The acceptance of this view would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract. This plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. . . . *[S]o far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.* (363 U.S. 593, 598-599; Emphasis supplied).

The same rule has been stated by this Court in commercial arbitration cases. *See, e.g., Bernhardt* v. *Polygraphic Co. of America, Inc.*, 350 U.S. 198, 203, n.4 (1956) ("Whether the arbitrators misconstrued a contract is not open to judicial review."); *Commonwealth Coatings Corp.* v. *Continential Casualty Co.*, 393 U.S. 145, 148-149 (1968) (". . . [arbitrators] have completely

free rein to decide the law as well as the facts and are not subject to appellate review.").

The decisions of the lower courts in this case are based squarely on, and dictated by, these previous decisions of this Court. The argument that an award should be vacated if the arbitrators did not apply "correct principles of law to the interpretation of the [contract]"—*e.g.* the rule of *contra proferentem*—was specifically addressed and rejected in the *Enterprise Wheel* case, *supra*. Revere's "public policy" argument does not alter the basic issue. It would require the courts to review the merits of an arbitrator's construction of a contract to determine if any rules of construction based on "public policy" had been improperly applied. Since all rules of contract construction embody some "public policy," acceptance of Revere's argument would swallow up the basic rule that an arbitrator's construction of a contract is not reviewable. Moreover, Revere's argument overlooks the fact that the Federal Arbitration Act embodies an overriding "public policy"—that arbitration is a substitute for litigation, and that an arbitration award therefore should be enforced even if the arbitrators have not construed a contract in the same way that a court might construe it.

2. The Decision Of The Court Of Appeals Is Entirely Consistent With The Decisions In Other Circuits.

Petitioner has not suggested that the decision of the Court of Appeals in this case conflicts with any decision in any other circuit. On the contrary, other circuits have followed the rule that an arbitrator's construction of a

contract is not subject to judicial review,[6] and the Court of Appeals for the Second Circuit has previously held, in *Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805 (2d Cir.), *cert. denied,* 363 U.S. 843 (1960), that the question of whether to apply *contra proferentem* is "within the province of arbitration," (274 F.2d at 809) and that an arbitrator's misapplication of such rules of contract construction "does not rise to the stature of 'manifest disregard' of law." (274 F.2d at 808).

3. No Important Or Unresolved Statutory Issues Are Presented.

Revere argues that the Court of Appeals' statement that there is a strong public policy favoring voluntary commercial arbitration[7] is in conflict with the statement in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967), that, in enacting the Federal Arbitration Act, Congress intended "to make arbitration agreements as enforceable as other contracts, but

[6] *See, e.g.*, Nat'l R.R. Passenger Corp. v. Chesapeake and Ohio Ry. Co., 551 F.2d 136, 142 (7th Cir. 1977) ("The courts are in agreement that arbitrators do not exceed their powers by misconstruing a contract"); I/S Stavborg v. Nat'l Metal Converters, Inc., 500 F.2d 424, 432 (2d Cir. 1974) ("Whatever arbitrators' mistakes of law may be corrected, simple misinterpretations of contracts do not appear to be one of them."); San Francisco-Oakland Newspaper Guild v. Tribune Publishing Co., 407 F.2d 1327, 1327-1328 (9th Cir. 1969) (". . .the courts have no business overruling [an arbitrator] because their interpretation of the contract is different.").

[7] The statement of the Court of Appeals is similar to the statement of this Court in Wilko v. Swan, 346 U.S. 427, 431 (1953): "The United States Arbitration Act establishes by statute the desirability of arbitration as an alternative to the complications of litigation."

not more so" (Petition at 13).[8] This argument attempts to confuse the question of the enforceability of an agreement to arbitrate with the different question of the scope of review of an arbitration award. The statement in the *Prima Paint* case, *supra,* is based on Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2 (reproduced at 12a), which provides that an agreement to arbitrate is valid and enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." Revere's petition does not present any issue relating to the enforceability of an agreement to arbitrate.[9] It only raises issues regarding the reviewability of an arbitrator's award once an agreement to arbitrate has been carried out and the dispute has been arbitrated. On this point the Federal Arbitration Act clearly reflects a strong public policy favoring the enforcement of an arbitration award. It does not permit review of an arbitrator's interpretation of a contract, but provides that an award can be vacated or modified only on the narrow grounds expressly listed in Sections 10 and 11 of the

[8] Revere also points to the Supreme Court's statement in Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-511 (1974), that the Arbitration Act was designed to put arbitration agreements on the same footing as other contracts (Petition at 14).

[9] Revere itself initiated the arbitration in this case and did not seek to avoid its agreement to arbitrate. If a party wishes to challenge its agreement to arbitrate it can seek a declaratory judgment that such agreement is not binding. Alternatively, it may sue in court and, if the other party moves to stay the court action based on the agreement to arbitrate, see 9 U.S.C. § 3, it may advance any contentions it has to oppose the stay. *See, e.g.*, Hellenic Lines, Ltd. v. Louis Dreyfus Corp., 372 F.2d 753 (2d. Cir. 1967); Bigge Crane and Rigging Co. v. Docutel Corp., 371 F. Supp. 240 (E.D.N.Y. 1973). However, a party may not submit a dispute to arbitration, thereby reaffirming the authority of the arbitrators, and later challenge its obligation to arbitrate. Boston and Maine Corp. v. Illinois Central R.R. Co., 274 F. Supp. 257, 260 (S.D.N.Y. 1967), *aff'd,* 396 F.2d 425 (2d Cir. 1968).

Act, none of which are applicable in the present case.[10]

Revere also argues that the Court of Appeals "commingled the Labor Act and the Arbitration Act" and improperly equated the scope of review of labor arbitration awards under the Labor-Management Relations Act with the scope of review of commercial arbitration awards under the Federal Arbitration Act (Petition at 19). The Court of Appeals did not "commingle" the two acts and this case does not present any issue regarding the differences, if any, in the scope of review under those two acts. Revere argued below that a prior statement by the United States District Court for the District of Columbia, to the effect that a court may refuse to enforce an arbitration award if it "compels the violation of law or conduct contrary to public policy,"[11] should be limited to labor arbitrations, and that a *broader* "public policy exception" should apply to commercial arbitration awards. The Court of Appeals explained that this prior lower court statement applied only in situations where an award enforced an illegal contract, or compelled illegal contract performance, and did not extend to alleged misunderstandings or misapplications of rules of contract construction, and the Court of Appeals rejected Revere's argument for a broader "public policy exception" in commercial arbitration cases, stating:

> A looser standard in other settings would upset the basic goal sought by Congress in enacting the Federal Arbitration Act. Allowing undue challenges

[10] Revere attempted to squeeze its motion under the language of Section 10(d) of the Federal Arbitration Act, 9 U.S.C. § 10(d), by arguing that the arbitrators "exceeded their powers" by not applying *contra proferentem* when construing the contract (Petition at 14).

[11] Union Employers Div. of Printing Indus., Inc. v. Columbia Typographical Union No. 101, 353 F. Supp. 1348, 1349 (D.D.C. 1973), *aff'd w/o opinion*, 492 F.2d 669 (D.C. Cir. 1974).

> to arbitration awards would defeat the finality and speedy dispute resolution expected of the arbitration procedure (4a, fn. 1).

Thus, the Court of Appeals did not confuse the Labor Act and the Federal Arbitration Act; it merely stated that there was no basis under the Federal Arbitration Act for applying a broader "public policy exception" to the enforceability of commercial arbitration awards than that which had been suggested in a prior labor arbitration case. It is at least possible that there could be *wider* latitude for "public policy" considerations in the review of arbitration awards in labor cases, where the scope of review is not expressly limited by statute. However, that question is not presented in the instant petition. It was sufficient in this case for the Court of Appeals to conclude that the Federal Arbitration Act, which expressly delineates the sole grounds for nonenforceability of a commercial arbitration award, does not authorize a general "public policy" review of an arbitrator's construction of a contract.[12]

4. The Legal Issue Stated By Petitioner Is Not Fairly Presented In This Case.

Petitioner's statement of "Questions Presented" assumes that the arbitrators in fact violated the rule of *contra proferentem*. That is not the case. The arbitrators did not find the contract ambiguous, nor did either of the two lower courts. The District Court stated that "it is not at all clear that this rule of construction [*contra proferentem*] has been violated" (11a), and further stated that "Revere has failed to convince the Court

[12] It should be noted that neither the petitioner nor the respondent has discovered any federal court case, whether involving a labor arbitration or a commercial arbitration, which has in fact vacated an award on "public policy" grounds.

that any error has occurred" (11a). If a Writ of Certiorari were to be granted, a dispositive ruling could not be made in favor of the petitioner unless a finding were made that the arbitrators did misconstrue the contract. The process of making such a determination would require the Court to review the extensive evidence and arguments that were presented to the arbitrators relating to the pertinent contract interpretation issues and to consider not only the rule of *contra proferentem,* but also the applicability of various competing rules of contract construction. For example, acceptance of Revere's proferred construction of the contract would violate the rule that an insurance contract is to be construed so as to give effect to all of its provisions. 13 Appleman, *Insurance Law & Practice* § 7383, pp. 34-36 (1976). More importantly, it would violate the most fundamental principle of insurance law, the "principle of indemnity," which provides that "insurance is aimed at reimbursement, but not more" and, therefore, "insurance contracts shall be interpreted and enforced consistently with this objective of conferring a benefit no greater in value than the loss suffered." R. Keeton, *Basic Text on Insurance Law* at 88 (1971). The arbitrators in this case awarded Revere the maximum value of its insured loss and expressly stated that a larger award would permit Revere to recover an amount "in excess of the reasonable value of what Revere claims to have lost" (Award at 90a).

5. The Result In This Case Has No Effect On Other Parties Or Other Claims Under The OPIC Program.

The result of the arbitration in this case affects only Revere and OPIC. Arbitration awards do not have precedential effect. Moreover, the key contractual provi-

sions which were at issue in this case appear in different form in subsequent versions of the OPIC contract.

6. Petitioner's Other Arguments To Support Its Petition Are Invalid.

Revere argues that the importance of this case for Revere is measured by $62,999,856, and that its importance for OPIC is measured by its impact on the credibility of the OPIC insurance program and the perceived fairness of the arbitration process. The sum of money involved is not alone sufficient to make Revere's petition worthy of consideration—particularly where such amount would constitute a "windfall" recovery, over and above the maximum value of Revere's loss. Similarly, neither the credibility of the OPIC insurance program, nor the perceived fairness of arbitration, is adversely affected by an award that compensated Revere for the maximum amount of its insured loss, but denied a windfall recovery. Neither lower court found any reason to question either the fairness or the correctness of the award.

CONCLUSION

The writ should be denied.

Respectfully submitted,

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Dated: May 8, 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1572

REVERE COPPER AND BRASS INCORPORATED,

Petitioner,

v.

OVERSEAS PRIVATE INVESTMENT CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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May 9, 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1572

REVERE COPPER AND BRASS INCORPORATED,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

1. OPIC asserts that the arbitral majority "did not find that the contract was ambiguous." (OPIC 1, 11-12).

The arbitral majority recognized the "force" of Revere's contention that the contractual provision relied upon by OPIC was "essentially meaningless" (86a, 85a)—certainly a high order of ambiguity. The pertinent provisions of OPIC's policy are part of the award (83a, 132a-134a), and the ambiguity which is created by the reference (133a) to Section 482 of the Code (134a) is manifest on the face of the award. There would be no occasion for the Court, OPIC to the contrary notwithstanding (OPIC 12), to go beyond the award itself in answering the questions presented.

2. In its restatement of the questions presented and on every page but one of its brief (OPIC 1, 2, 4, 5, 6, 7, 8, 9,

10, 11, 12, 13), OPIC characterizes the award as simply involving the construction of a contract.

Such repetition does not change the fact that an ambiguous insurance policy was construed in favor of the insurer and thus a rule of public policy was violated. OPIC, the insurer, has been permitted to sell an ambiguous insurance policy and then use the ambiguity as a defense against Revere, the insured. None of the cases cited by OPIC involve an insurance relationship. *Contra proferentem* is, in the context of insurance, not simply a rule of construction. It is the expression of a fundamental public policy. OPIC elides from its quotation (OPIC 6) from *Enterprise Wheel* this Court's statement that the question of interpretation of "the collective bargaining agreement" is a question for the arbitrator (363 U.S. at 599) and ignores the fact that the labor-management relationship is a "formal government of its own" (*id.* at 596-97 n.2).

3. OPIC says (OPIC 9) that Revere "attempts to confuse the question of the enforceability of an agreement to arbitrate with the different question of the scope of review of an arbitration award."

OPIC concedes, tacitly, that under § 2 of the Arbitration Act public policy is a ground for the revocation of an arbitration clause (*ibid.*). OPIC then asserts (OPIC 9-10) that an award may be vacated or modified only on the grounds listed in §§ 10 and 11. OPIC, again tacitly, is arguing that despite the teaching of *Hurd* v. *Hodge*, 334 U.S. 24, 34-35 (1948), an award which violates public policy may nevertheless be made a judgment of the district court under § 13. Yet, even the court of appeals recognized (4a) that there is a "public policy exception to the enforcement of arbitration awards" although it erroneously confined the exception to a formulation developed in the review of labor awards.* The confusion is in OPIC's response, not in Revere's argument.

4. OPIC says (OPIC 11) that the Court of Appeals "did not confuse the Labor Act and the Federal Arbitration Act".

OPIC's justification (*ibid.*) for the assertion is that the court of appeals "merely" stated that there was no difference between the policies expressed in and the situations governed by the two acts. OPIC in terms thus concedes the application by the court of appeals of the policy of the Labor Act to an arbitration governed by the Arbitration Act. That the court did so is the subject of the second question presented.

5. OPIC says (OPIC 12) that the result here "affects only Revere and OPIC." **

OPIC's statement is sophomoric. In the strict sense, of course, the results in all litigations affect only the litigants. It is the questions presented, however, which, matter. They are important, unresolved questions of federal law. The erroneous answers of the court of appeals confirm informed distrust of the arbitration process where the courts, succumbing to easy generalizations, have mistakenly given arbitrators entire freedom to make arbitrary decisions from which no relief may be had. OPIC

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* OPIC does not respond to the fact that the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* explicitly authorizes the courts to deny enforcement to awards which are contrary to domestic public policy—an authority and mandate so plain in domestic law and as applied to domestic awards that it needed no statement in the Arbitration Act.

** OPIC says (*ibid.*) that arbitration awards do not have precedential effect. However, the arbitrators here cited (46a, 48a, 49a, 61a, 62a) a number of awards, and OPIC argued to the arbitrators earlier awards to which it had been party.

would prefer to ignore the matter, but the questions here presented bear upon the some $9,000,000,000 of OPIC insurance in force.

6. OPIC asserts that Revere seeks "an anomalous and unjust result" (OPIC 4) that Revere's claim violates the "'principle of indemnity'" (OPIC 12) and that Revere would have received a "windfall" (OPIC 13) if it had received the $62,999,856 by which the arbitral majority reduced Revere's Net Investment.

Yet, OPIC concedes (OPIC 3 n.4) that

> "The contract provided that compensation was to be Revere's 'Net Investment' in RJA as of the date of expropriation, and that 'Net Investment' was *to be determined by a contractual formula,* which required that the original amount of the insured investment be reduced to reflect subsequent losses of RJA (132a-133a)." (Emphasis added.)

OPIC also acknowledges that Revere's insured equity investment had a "book value" of $64,131,000 (OPIC Br. 3).* This book value reflected RJA's losses up to the time of its expropriation by the Government of Jamaica. It did not reflect unrealized losses; any reduction in Net Investment by reason of unrealized losses was expressly prohibited by OPIC's insurance policy (132a). OPIC chose the measure of Revere's loss under the policy for which Revere paid some $600,000 each year in premiums. Revere did not purchase insurance in an indeterminate amount to be computed after occurrence of the insured event any more than one who purchases a life insurance policy expects its "value"

* OPIC states that RJA's books were prepared on a "consolidated" basis. This statement is not true. The financial statements showing Net Investment were certified by Coopers & Lybrand and were those of RJA alone.

to be the object of a subjective determination after death. Revere contracted, in a relationship of *uberrima fides,* for compensation in accordance with a pre-agreed formula. Revere's investment was expropriated, and OPIC did not contest this finding in the courts below. The "anomaly" is that Revere has not received the compensation promised by OPIC's insurance policy.

CONCLUSION

The writ of certiorari should issue.

Respectfully submitted,

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